Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

LEONARD N. BEBCHICK, Individually and
On Behalf of All Others Similarly Situated,

Petitioner,

vs.

HOLLAND AMERICA LINE-WESTOURS, INC., and
FRANCINE PICKETT, BRIAN COHEN, JACK MASIN,
and BELLE MASIN, Individually and
On Behalf of All Others Similarly Situated,

Respondents.

**On Petition For Writ Of Certiorari
To The Washington Supreme Court**

PETITION FOR WRIT OF CERTIORARI

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103 PP

QUESTIONS PRESENTED

1. Are the 14th Amendment's due process or equal protection clauses infringed when an intervening putative class member is deprived of his lawful right to a merits review of the denial of class certification for trial?

Here, where the Washington Supreme Court, in reversing an intermediate appellate decision finding certification for trial to be warranted, (a) did not, directly or indirectly, address the merits of that issue, and (b) held that the singular issue to be decided is the fairness of a class settlement (itself bottomed on the denial of certification for trial) to be determined solely in light of the circumstances before the trial court including the then probabilities of petitioner's chances of overturning that denial of certification.

2. Is the 14th Amendment due process clause infringed where the Washington Supreme Court undertook to review and itself approve a class action settlement while rejecting an inquiry into the glaring inconsistency between the trial court's denial of certification for trial because of a preponderance of individual issues and its subsequent approval of certification for settlement because of an alleged preponderance of wholly unspecified common issues?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Leonard N. Bebchick respectfully petitions for the issuance of a writ of certiorari to review the judgment of the Supreme Court of Washington.

OPINIONS BELOW

The opinion of the Supreme Court of Washington ("Supreme Court") is reported at 35 P.3d 351 (Wn. 2001). App 1. The earlier opinion by the Washington Court of Appeals-Division 1, reversed by the Supreme Court, is reported at 6 P.3d 63 (Wn.App. 1999). App. 37. Excerpts from the unreported decision of the trial court, Washington Superior Court for King County, in approving a class settlement agreement appear at App. 66.

JURISDICTION

The Opinion of the Supreme Court was entered on November 29, 2001. Petitioner Bebchick filed a timely petition for reconsideration which was denied on February 20, 2002. App. 69. This court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

The principal provisions of law presented are the two clauses of Section 1 of the Fourteenth Amendment to the U.S. Constitution which read:

" . . . ; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Relevant provisions of State law appear at App. 70-72.

STATEMENT OF THE CASE

This suit was initiated as a cruise passenger class action under the Washington Consumer Protection Act. RCW 19.86.010 *et seq.* It seeks recovery of amounts charged and collected by Holland America Line-Westours, Inc. ("Holland") as representing mandatory pass through port charges and taxes. However, the bulk of these charges (ranging from $100-$300 per passenger) were designed and retained by Holland for its own corporate purposes. This petition for writ of certiorari is filed by an individual putative class member, Leonard N. Bebchick ("Bebchick"), an attorney residing in Maryland, who had objected to a proposed class settlement. Following the entry of judgment by the trial court, Bebchick was permitted to intervene as of right for the purpose of exercising appellate rights.

On April 19, 1996, suit was filed in the Superior Court of King County, Washington on behalf of some 1.2 million putative class members residing at about 750,000 addresses nationwide. Holland's cruise contracts require that all suits be brought in Washington courts and that

Washington law govern. Discovery ensued with the materials being kept confidential and under seal. On September 27, 1997, the trial court denied plaintiffs' motion for class certification on the grounds that individual issues as to governing law, injury, causation and limitations predominated over common issues. App. 61. A petition for discretionary review of that determination was denied by a Commissioner of the Washington Court of Appeals-Division 1.

Thereafter, counsel for the parties entered into settlement discussions, and an agreement was reached which received the trial court's provisional approval. That agreement provides that passengers traveling on Holland cruises during the four years prior to suit are to receive a coupon ranging from $10 to $50 with the bulk (some 90%) of the coupons being either $10 or $25, depending on whether the cruise purchase occurred in 1992-94 or 1995-96. The coupons are redeemable only when presented for credit against the purchase of a new Holland cruise and only if the booking is made *not earlier than* 45 days prior to departure.

Petitioner Bebchick, a putative class member, received notice of the proposed settlement through the mails. He timely filed his Objection to the settlement together with supporting affidavits by an expert on coupon redemptions based in Chicago. On October 5, 1998, Bebchick and his expert appeared at the settlement hearing in Kent, Washington. He was permitted to present argument but not to call his expert or examine experts whose affidavits had been submitted both by Holland's and plaintiffs' counsel. The court approved the settlement and rested its determination in large measure upon the

fact that it earlier had denied class certification for trial with plaintiffs now viewed as being in "a sort of helpless position because of the Court's ruling." App. 67. Although the court's earlier denial of class certification for trial was based upon the asserted preponderance of individual over common issues (App. 61-62), the court proceeded to certify the class for settlement upon a bald and conclusory finding, contained in a form of judgment prepared by counsel, that wholly unspecified "common issues of law and fact predominate over questions affecting only individual Class members." App. 65, 33.

Bebchick thereupon pursued his petition to intervene as of right. Upon reconsideration, the court granted Bebchick "leave to intervene as an individual class member plaintiff for the limited purpose of seeking appellate review of the court's approval of the class settlement and/or its denial of class certification for trial. . . . " He then noticed an appeal from both of these decisions. App. 80.

Bebchick prosecuted his appeal *pro se* to Washington's Court of Appeals-Division 1. In a unanimous panel decision issued on August 14, 2000, the appellate court reversed "as a matter of law or as an abuse of discretion each of the trial court's reasons for denial of class certification for trial." App. 59. It found that all of the allegedly individual issues were in fact common issues, which thereby "clears the way for certification of the class action . . . on remand." *Id.* As the trial court's approval of the settlement "was based upon its previous denial of a certifiable class," the Court of Appeals vacated the settlement, since the court's reversal "dramatically changes the facts and will undoubtedly change the analysis of each

factor [pertinent to settlement approval] by both the court and the plaintiffs' class." *Id.*

Thereupon, Holland successfully petitioned the Supreme Court for review. In its Opinion of November 29, 2001, the Supreme Court, with two justices dissenting ("the dissent") (App. 26), proceeded itself to approve the settlement without addressing, in any fashion, the merits of the trial court's denial of class certification for trial or the Court of Appeals adjudications on that subject. *Id.* The Supreme Court held that "the Court of Appeals erred by deciding the merits of the trial court's denial of class certification in the first instance, rather than confining itself to the question of whether the class settlement was 'fair, adequate, and reasonable.' " App. 26, 14. The Supreme Court further held that the fairness and reasonableness of the settlement properly must be judged only in light of plaintiffs' likelihood of appellate success, given the trial court's prior denial of class certification for trial, as they **then** appeared to the trial court. App. 14. The Supreme Court proceeded itself to assess the "rough probabilities of success as they existed at the time of the settlement." App. 12. Finding that the contested issues "injected a high degree of uncertainty into this case of Plaintiffs" (App. 23), the Supreme Court reversed the Court of Appeals and held "that the class settlement is fair, adequate and reasonable," thereby ending the litigation. App. 26.

As is apparent from the opinions of the Court of Appeals and the Supreme Court, the issue of Bebchick's right to secure a merits review of the denial of class certification was fully briefed and addressed. In addition, the incompatibility of that denial with the grant of class

certification for settlement and the need for an *Amchem* type of inquiry was briefed (App. 75) and thereafter argued by Bebchick before the Supreme Court and was adopted by the dissent. App. 29-36. The 14th Amendment issues here asserted were raised in a portion of Bebchick's petition for reconsideration to the Supreme Court following the entry of its decision. App. 73. The petition for reconsideration ultimately was denied. App. 69.

ARGUMENT

A. THE DEPRIVATION OF ESSENTIAL RIGHTS IN VIOLATION OF THE 14TH AMENDMENT IS BOTH MANIFEST AND OF FUNDAMENTAL SIGNIFICANCE.

Question 1 – Right of Appeal

Bebchick and the putative class members have been deprived by State action of substantial property rights – their lawful right to a merits appeal in exercise of their statutory right to damages – in violation of the 14th Amendment's due process and equal protection guarantees. These plaintiffs have been impermissibly denied their appellate right to secure a merits review of the trial court's denial of class certification for trial. Here we address the basic and clear cut violation of constitutional protection. In section B. Question 1, *infra,* we address the overriding national importance for this court to now review this egregious violation of constitutional right.

Washington's Consumer Protection Act accords plaintiffs the right to secure recompense for damages sustained as a result of deceptive acts perpetrated by

Holland. RCW 19.86.090, App. 51. Washington law entitles plaintiffs to secure the adjudication of their CPA claims on a class basis where the requisites for class certification, identical to Federal requirements, are met. App. 9, 30. Washington law grants plaintiffs the right to secure appellate review on the merits of the trial court's denial of class certification for trial. See provisions of Washington's Constitution and Rules of Appellate Procedure ("RAP") appearing at App. 70-72 and particularly RAP 4.1 and 2.4. Washington law also provides that "the denial of discretionary review of a superior [trial] court decision does not affect the right of a party to obtain later review of the trial court decision or the issues pertaining to that decision." RAP, Rule 2.3(c). *Id.*

The Supreme Court deprived plaintiffs of their rights to secure class damage recompense and class certification merits review when it (a) refused to consider, as properly presented, the merits of the trial court's denial of class certification for trial, (b) reversed, without addressing the merits of that issue, the action of the Court of Appeals-Division 1 in holding that class certification for trial was improperly denied and that the class should be certified for trial, (c) held that the fairness and reasonableness of the class settlement should be considered first, and then only in light of the circumstances (including the prior denial of class certification) and the likelihood of plaintiffs' appellate success on that issue as they appeared to the trial court at the time of the settlement hearing, and (d) undertook itself to approve the settlement agreement without addressing either the issue of the denial class certification for trial or, indeed, the propriety of the trial

court's wholly inconsistent action in certifying the class for settlement.

Unlawful action by a State court constitutes State action under the 14th Amendment. *Shelley v. Kraemer*, 334 U.S. 1 (1948) and the authorities cited at 14-15. A right to bring suit is a substantial property right under the 14th Amendment. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Moreover, this court effectively has found that the right of an intervening putative class member to challenge the denial of class certification for trial itself constitutes a substantial property right. See, *Lane v. Bethlehem Steel Corp.*, 93 F.R.D. 611, 614-15 (D.Md. 1982) discussing various of this court's decisions including *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980) and *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977); these authorities and their significance were submitted to the Supreme Court in response to its questioning at argument. App. 78.

To be deprived by a court of a substantial property right without being accorded the "hearing" or other due procedure provided by law, including meaningful access to a prescribed adjudicative tribunal, constitutes a denial of 14th Amendment due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-31 (1982); *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Brinkerhoff-Farris Trust & Savings Co. v. Hill*, 281 U.S. 673, 681-82 (1930); *Richards v. Jefferson County*, 517 U.S. 793, 802-04 (1996). Indeed, even where a substantial property right is *not* present, this court has held that the arbitrary or unreasoned denial of a prescribed right of appeal itself constitutes a denial of the 14th Amendment's equal protection clause. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956); *Lindsey v. Normet*, 405 U.S. 56,

77 (1972). Here, the Supreme Court's implicit and "unreasoned distinction" between named and intervening putative class members who elect to challenge class certification denials constitutes discriminatory judicial action which lacks a rational basis and "can only impede open and equal access to the courts." *Mayer v. City of Chicago*, 404 U.S. 189, 193 (1971).

Washington's arbitrary and unconstitutional deprivation of Bebchick's right of appeal and merits review is underscored by the Supreme Court's two-fold commission of error on that issue. First, the court erred in refusing to review or otherwise address the merits, as presented, either of the trial court's denial of class certification for trial or the Court of Appeals' reversal thereof. Secondly, the Supreme Court erred when it undertook itself to approve the settlement, bottomed on the very denial of certification, (a) without addressing the merits of that denial, and (b) in holding that settlement approval can be decided only on the basis of the situation before the trial court at the time.

In lieu of a merits review of class certification denial, the Supreme Court provided Bebchick and other putative class members with a review of the likelihood and "rough probabilities of success" of any appellate challenge that plaintiffs might mount to that denial *"evaluated as it existed at the time of settlement."* App. 12, 14. But a reviewing court's assessment of the pre-appeal likelihood of success hardly is a substitute for a review, as of right, on the merits. While Bebchick indeed had a "uphill battle" (App. 15), the dispositive fact is that he won that battle on the merits in spades before the Court of Appeals. That victory and his right to a merits review hardly can be denied

him and other putative class members because the odds initially were in Holland's favor. A merits review means a fair consideration of the merits on the issues presented on appeal, not a consideration of the chances of prevailing on those issues as they appeared before the appeal was taken.

In short, the Supreme Court has simply negated Bebchick's lawful right of appeal (*i.e.*, "to be heard" or "to have one's day in court") both by the direct and indirect actions taken by it. This court has long held that such a denial of due process to absent class and other plaintiffs overrides State judicial action based upon State law. *Hansberry v. Lee*, 311 U.S. 32 (1940) and *Richards v. Jefferson County*, 517 at 799-802 (1996). The unconstitutional deprivation of right and injury suffered by Bebchick and other absent class plaintiffs – being held bound by a prior and unchallengeable adjudication – is no less here than it was in those cases.

There is one final point. The Supreme Court's error in not according Bebchick a merits review of the denial of certification for trial is underscored by its refusal to test that denial against the trial court's subsequent approval of class certification for settlement. In our discussion of Question 2 which immediately follows, we address the Supreme Court's infringement of due process in rejecting the type of inquiry, as urged by the dissent, prescribed by *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). But this rejection by the Supreme Court also is a pertinent factor in determining the validity of its deprivation of a merits review on the denial of class certification for trial, a type of review that inheres in and of necessity would

have occurred had an *Amchem* type of inquiry been undertaken. *Amchem* thus is implicated in both petitioner's Questions 1 and 2.

Question 2 – *Amchem* Type of Inquiry

In approving the settlement, the Supreme Court, as the dissent emphasizes (App. 36), committed "plain and palpable error" in determining to place beyond appellate review "the 180 degrees apart" inconsistency between the denial of certification for trial (based on the alleged preponderance of individual issues) and the approval of certification for settlement (based on the alleged preponderance of wholly unspecified common issues). The Supreme Court's approval of the settlement in light of that flat inconsistency stands as arbitrary and unreasoned judicial action constituting a denial of due process.

The fundamental inconsistency of the trial court's certification actions as well as this court's decision were presented in Bebchick's briefing to the Court of Appeals (App. 75)[1] and his argument to the Supreme Court. While due process concerns were not an express basis for the court's decision in *Amchem*, it is clear that such considerations inhere in and emanate from that decision. See, *Amchem*, 521 U.S. at 621, 623, 625; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846-848 (1999); *Stephenson v. Dow Chemical Co.*, 273 F.3d 249, 259-61 (2d Cir. 2001). Here, the rationale

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[1] Cases before the Washington Supreme Court are considered on the Briefs and the record before the Court of Appeals with the parties having the right only to simultaneously file a Supplemental Brief not to exceed 20 pages. RAP, Rule 13.7(d).

of *Amchem* rises to its full constitutional dimensions. There is an absolute and inexplicable incompatibility on this record of the denial of class certification for trial because of a preponderance of individual issues and the subsequent approval of class certification for settlement because of an asserted preponderance of common issues.

As both the majority and the dissent noted, Washington Civil Rule 23 is identical to Rule 23, Fed.R.Civ.P., and the Washington courts have chosen to treat Federal precedents in interpreting that Rule as "highly persuasive." App. 9, 30. Moreover, in undertaking itself to approve the coupon settlement agreement, the Supreme Court invoked a litany only of Federal authorities. App. 8-16. In acting to reject the *Amchem* type inquiry forcefully advocated by the dissent, the Supreme Court neither articulated nor adverted to any State law provision or consideration. Moreover, even if the Supreme Court had invoked State law, paramount and fundamental Federal due process concerns, as here presented in a class action setting, are entitled to override and prevail against State court action. *Hansberry v. Lee*, 311 U.S. 32 (1940); *Richards v. Jefferson County*, 517 U.S. 793 (1996). Finally, as discussed at section B. Question 2, *infra*, review by this court is required at this time as the Supreme Court's action stands as an open invitation for class plaintiffs' counsel to bypass the Federal courts and flock into State courts to evade the requirements of *Amchem*.

B. THE ISSUES PRESENTED ARE OF GREAT IMPORTANCE WITH NATIONWIDE IMPACT AND NECESSITATE REVIEW NOW

Question 1 – Right of Appeal

The issue presented – the denial of a 14th Amendment protected right to a merits appeal of the denial of class certification for trial – is of great importance with nationwide impact. The failure of this court now to review and address that critical issue will result in irreparable unconstitutional injury to millions of putative class members in class suits hereafter filed – injuries which then will effectively be beyond the ken of this court to remedy.

For the moment, Washington alone has acted to deprive putative class members of their appeal right to such a merits review. Whether other States will follow suit is uncertain, but it is not unlikely that at least some may. But Washington's action itself has far reaching consequences in that State which requires this court to now issue the writ and address the issue.

This very suit involves some 1,200,000 putative class members residing across the length and breadth of the land with only a small portion being Washingtonians. The amount of potential recovery, not disclosed to the trial court but derived from discovery documents released to Bebchick and filed under seal with the Court of Appeals, could, with interest, well approach $200 million.

But the future impact of the Supreme Court's decision in Washington will be far greater, as evidenced by

what is asserted in the granted motions of two Washington trade associations for leave to file amicus briefs with that court.

Washington State is a hotbed of technology, particularly in the software and other computer related activities. As stated in the motion of Washington Software Alliance ("WSA") filed by Preston, Gates & Ellis, LLP, the State is a leader in the digital community, and WSA's 1,600 members include both small and large companies which "produce and market a full range of software products including computer operating systems, desktop publishing programs, design and engineering tools, business and consumer productivity applications, server applications, interactive media programs, games, and Internet platform and development tools."

WSA's motion recites many of its members issue licenses that, like Holland's cruise contract, require that they be construed under Washington law, and that its members face a growing number of suits alleging the sale of defective products or misrepresentations as to the capabilities and compatibilities of their products. The motion concludes that issues arising under the licenses of WSA members create the potential for nationwide consumer class liability having special interest to those members.

The motion of the Association of Washington Business ("AWB") asserts that AWB is the State's largest business association with 3,700 members, many of which deal with consumers both inside and outside of Washington. As " . . . many AWB members are potentially subject to the provisions of the Washington Consumer Protection

Act ("CPA") [citation omitted] . . . AWB is vitally interested in the correct and reasonable interpretation of the CPA, particularly in the context of class action certification. AWB is also vitally interested in the correct interpretation of CR 23 to assure that class actions are only certified when common issues of fact and law truly predominate over individual questions."

It is clear that Washington will be the situs of numerous nationwide class actions where the rights of putative class members to seek a review of a denial of class certification for trial will be effectively aborted once a settlement is reached. But the impact likely will become more insidious. The knowledge that a settlement following a denial of certification for trial will be largely immunized from meaningful judicial review will prove attractive to those members of the plaintiff class counsel bar who have a greater incentive in reaching a quick settlement and moving on rather than diligently contesting a denial of certification for trial. See, *e.g., Reynolds v. Beneficial National Bank*, ___ F.3d ___, 2002 WL 655931 *1, 4 (7th Cir. Apr. 23, 2002); *Amchem*, 521 U.S. at 621.

Unless this court now issues its writ, it is probable that the number of nationwide class actions brought in Washington will grow with an enhanced likelihood that denials of class certification for trial will result, not in a challenge on appeal, but in an agreed settlement *undisciplined by the prospect* of such an appeal by an intervening putative class member. See, *Amchem*, 521 U.S. at 621, 623; *Kaplan v. Rand*, 192 F.3d 60, 67 (2d Cir. 1999). Such a development hardly should be facilitated by this court, particularly as (a) fundamental issues of 14th Amendment deprivation are implicated, and (b) **it is virtually**

inconceivable, given the decision of the Supreme Court, that an unnamed putative class member such as Bebchick will appear to intervene in a future class suit for the sole purpose of being ultimately positioned, following two necessarily futile appeals, to then seek this court's review of Question 1 here presented. In short, the Supreme Court's unconstitutional precedential action in depriving unnamed plaintiffs of their lawful right to a merits review of class certification denial will subject putative members of nationwide classes seeking certification to continuing and effectively irreparable economic injury.

The public interest in the sound administration of justice mandates that this court now address the constitutional issue presented – the rejection of the right for merits review of the denial of class certification for trial. Moreover, that public interest mandates that the propriety of class certifications for settlement receive, and not be shielded from, judicial scrutiny, particularly where they are made following a denial of certification for trial. Finally, it is contrary to public policy to encourage a further balkanization of nationwide consumer class suits, whether by allowing Washington to become a "Reno" for quickie settlements of class actions or to follow in the wake of some Alabama counties. While Congress may eventually do its part where national class action legislation is required, this court properly has a vital role to play in assuring that the deprivation of vital constitutional protections do not continue to remain unremedied with resulting irreparable economic injury to millions.

Question 2 – *Amchem* Type of Inquiry

In spurning the dictates of *Amchem* and the due process considerations inherent in and emanating from that decision, the Supreme Court has opened the door for the wholesale evasion of *Amchem's* requirements by providing class plaintiffs with an invitation to bypass the Federal courts and to seek the sanctuary of Washington courts. The knowledge that a class likely will be certified for settlement without regard either to any denial of certification for trial or the commonality requisites for class actions provides class counsel with an powerful incentive to spurn the Federal judiciary and to seek the haven of Washington courts and those of other States which may follow suit. Indeed, the vigorous advocacy of their clients' interests virtually mandates that counsel take such evasive action. In short, the essential strictures enunciated in *Amchem* and *Ortiz* and the fundamental due process concerns which those decisions embody will increasingly be consigned to the scrap heap. That will occur even if no other State follows the lead of Washington, as that State alone will provide the opportune haven, particularly for "pre-arranged" class settlement suits. This case presents the court with an essential and timely opportunity now to directly address the constitutional dimensions of *Amchem* and *Ortiz* and to fashion rules that will properly guide the course of nationwide class action litigation and head off a detour around the Federal judicial system.

CONCLUSION

For the foregoing reasons, petitioner Bebchick prays the court to grant his petition and to issue a writ of certiorari to the Washington Supreme Court.

Respectfully submitted,

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Supreme Court of Washington,
En Banc.

Francine PICKETT, Brian Cohen, Jack Masin, Belle Masin, individually and on
Behalf of all other similarly situated, Respondents
Leonard BEBCHICK, Respondent,
Joseph HESS, Leona Hess, Tom Crago, and Linda Crago, Intervenors,
v.
HOLLAND AMERICA LINE-WESTOURS, INC.,
Petitioner.

No. 70300-1.

Nov. 29, 2001.

MADSEN, J.

In 1996, Francine Pickett, Brian Cohen, and Jack and Belle Masin (Plaintiffs) filed suit against Holland America Line-Westours, Inc. (Holland) on behalf of all persons similarly situated (those persons purchasing cruises after April 19, 1992) to recover a portion of the "port charges and taxes" charged to them in addition to their cruise fares. Clerk's Papers (CP) at 2-14. The foundation for Plaintiffs' claim is that these charges exceeded the actual taxes and port charges paid by Holland to port authorities and governmental entities, that Holland used the markup for other corporate purposes, and that Holland misrepresented this fact in its advertising and contracts. Plaintiffs claimed this was a violation of the Washington Consumer Protection Act (CPA), chapter 19.86 RCW, and raised additional claims of unjust enrichment and negligent misrepresentation. *Id.*

Pursuant to CR 23(b)(3) Plaintiffs moved for class certification of their CPA claims. Their motion was denied by the trial court. Plaintiffs sought interlocutory discretionary review by the Court of Appeals of this ruling. *See* RAP 2.3(b). The Court of Appeals Commissioner denied discretionary review, based on a determination that Plaintiffs failed to establish that the trial court "committed obvious or probable error." CP at 1234-41.

Thereafter, the parties reached a proposed settlement, the trial court conditionally certified a class for settlement purposes, and notice was sent to the class members, allowing them to "opt out" or appear at the hearing and object to the settlement. A lone objector, Leonard Bebchick (an attorney from the District of Columbia), intervened and sought court disapproval of the settlement. Notwithstanding Bebchick's objection, the trial court approved the settlement as being "fair, adequate, and reasonable" and entered an order to this effect. Bebchick appealed, with Holland and the Plaintiffs standing in opposition, and the Court of Appeals reversed in a published decision. *Pickett v. Holland Am. Line-Westours, Inc.*, 101 Wn.App. 901, 922, 6 P.3d 63 (2000). We hold that the class settlement is "fair, adequate, and reasonable," and we reverse.

FACTS

The named Plaintiffs in this case are Francine Pickett (from New York), Brian Cohen (also from New York), and Jack and Belle Masin (from Florida). On April 19, 1996,

they filed suit against Holland, a Seattle based corporation, on behalf of all consumers who purchased cruises on Holland after April 19, 1992 (the preceding four years) and paid "port charges and taxes" in addition to their cruise fare.

Plaintiffs complaint alleged violations of the Washington CPA, negligent misrepresentation, and unjust enrichment. The gravamen of Plaintiffs claim is that Holland represented to them, through its advertising and cruise contracts, that "port charges and taxes" were mandatory fees levied by port authorities and government entities, when in fact a portion of these fees were knowingly collected by Holland for other purposes. The following provision of Holland's cruise contract is illustrative of Holland's representations:

> "Additions to Fare/Port Charges/Taxes: . . .
>
> (b) Similarly, the amount specified in the Holland America Line brochure for port charges and taxes was based upon the amount of governmental charges, taxes and fees in existence at the time of printing. If increases have occurred or should hereafter occur in those amounts, Owner and HALW reserve the right to require you to pay the additional amounts as a condition of taking the Cruise or Cruisetour. No right of cancellation exists under these circumstances."

Pickett, 101 Wn.App. at 917.

Plaintiffs never alleged they were "overcharged" and each named Plaintiff concedes that they paid "port charges and taxes" in the exact amount advertised in Holland's literature. CP at 845; 867-69; 885, 911. Instead,

Plaintiffs alleged that Holland deceived them by representing that "port charges and taxes" were solely governmental fees, when in fact, a portion of these fees were used by Holland for other purposes. Plaintiffs sought recovery of the difference between the actual governmentally imposed port charges and taxes, and the amount collected by Holland.

The financial documents illustrating the amounts charged passengers for "port charges and taxes," and the corresponding amounts paid by Holland for actual governmentally imposed charges were filed with this Court under seal. These documents provide a rough approximation of the amount allegedly overcharged. For instance, for one specific seven-day cruise consumers were allegedly overcharged $26.48. Charges and expenses for other cruise destinations are similar in amount. The amounts are higher for longer cruises.

On July 24, 1996, Holland moved for partial summary judgment against all Plaintiffs other than Pickett, arguing that their actions were barred by a contractual limitations period. Holland's cruise contract provides that a lawsuit may not be maintained against Holland unless it is notified in writing of any potential claim within 30 days of the conclusion of the cruise, and the lawsuit is filed within 180 days after the cruise. The only named Plaintiff to comply with this provision was Pickett.

Judge Armstrong held that Washington's discovery rule was applicable to Plaintiffs' CPA claims, *see* RCW 4.16.080(4), and as such, the claims of plaintiffs were tolled until they discovered the facts underlying their cause of action. Based on the limited amount of discovery

conducted at that point in the proceedings the court was unable to make a determination on this issue, and accordingly, Holland's motion was denied.

Plaintiffs quickly moved for class certification pursuant to CR 23. Concerned about the expense of certifying a class with upward of a million members, the court deferred its ruling on this question to allow the parties time to conduct discovery and submit briefing regarding the likelihood of Plaintiffs success on the merits. Judge Armstrong recognized that the decision of whether to certify the class was not dependent on the merits of the action, but nevertheless wanted some analysis on the viability of Plaintiffs claim before undertaking the expense of certifying such a large class.

The matter was then transferred to another trial judge, Judge White. After extensive briefing, the trial court heard Plaintiffs class certification motion on September 22, 1997. Holland argued that class certification was improper under CR 23(b)(3), which requires, in part, a finding that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." CR 23(b)(3). The trial court agreed, citing three critical issues. First, the court found that the need to address choice of law questions for individual class members would make class certification inefficient. Second, the court found that there is a significant number of individualized inquiries that would have to be made with respect to Holland's contractual limitations period. And third, individual issues of

proof related to causation and injury by each class member would cause "individual issues [to] predominate over common questions." CP at 66. Accordingly, Plaintiffs' motion was denied.

Plaintiffs sought interlocutory discretionary review of the trial court's ruling. On January 22, 1998, in an eight page decision, the Court of Appeals Commissioner denied review of the trial court's denial of class certification based on a determination that the trial court did not commit "obvious or probable error." CP at 1241.

Thereafter, the parties reached a settlement agreement and a class was conditionally certified for settlement purposes. Pursuant to the settlement agreement, members of the class were to receive fully transferable travel vouchers, redeemable for future Holland cruises. They are valid for three years from the date of issuance. The voucher amounts vary, depending upon the length of the original cruise and the date of its departure. The amounts are as follows:

Years of Departure	Duration of Cruise	Voucher Amount
1992-94	Under 14 Days	$10.00
	14-21 Days	$15.00
	Over 21 Days	$20.00
1995-96	Under 14 Days	$25.00
	14-21 Days	$37.50
	Over 21 Days	$50.00

The principal restriction on use of the vouchers is that they must be used for a booking made within 45 days of departure.

On April 21, 1998, the trial court preliminarily approved the settlement and scheduled a hearing for September 28, 1998, to determine whether the settlement was "fair, adequate, and reasonable." The court also ordered that notice of the proposed settlement be given to all class members allowing them to object to the settlement or "opt out." Fewer than 50 objections were made out of a class of over 750,000. One of these objectors, Leonard Bebchick, appeared at the court's reasonableness hearing and is the respondent before this Court.

On October 2, 1998, after evaluating the settlement in open court, the trial court entered a final judgment and order of dismissal with prejudice, approving the class settlement. Specifically, the court found that the "[s]ettlement is, in all respects, fair, reasonable, and adequate to the Plaintiff settlement class, and within the authority of the parties and resulted from extensive arm's-length negotiations." CP at 289.

The Court of Appeals reversed in a published decision. *Pickett*, 101 Wn.App. 901. The court initially determined that the trial court's original order denying class certification was wrong. Specifically, the court held: (1) that Washington law applied to each of the class members' CPA claims, so there were no individual choice of law questions; (2) a showing of individual reliance was not required under the CPA, and thus, there were no individual issues as to causation; and (3) that none of the class members' claims were time barred. After making these legal determinations the court disapproved the settlement, stating that its holding regarding class certification "clears the way for certification of the class action by the trial court on remand. This dramatically changes the

facts and will undoubtedly change the analysis of each factor by both the court and the plaintiffs' class." *Id.* at 922. Holland petitioned this Court for its review. The Washington Software Alliance and the Association of Washington Business have filed amici briefs urging reversal. We hold that the class settlement is "fair, adequate, and reasonable." Accordingly, we reverse.

ANALYSIS

The principal issue before this Court, despite the contentions of Bebchick (and now the Class), is whether the Court of Appeals erred by addressing the merits of the trial court's original denial of class certification in the first instance, rather than confining itself to the question of whether the class settlement is "fair, adequate, and reasonable."[1]

"The class action device, while capable of the fair and efficient adjudication of a large number of claims, is also susceptible to abuse and carries with it certain inherent structural risks." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 623 (9th Cir.1982). CR 23 is designed to guard against many of the potential failings of the class action device, and consequently protect the interests of all

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[1] Before the Court of Appeals the Class advocated affirmance of the trial court's approval of the settlement, reasoning that Bebchick's arguments show his "fundamental misunderstanding of both (1) the trial court's role in evaluating a proposed class action settlement; and (2) this Court's role in reviewing the trial court's approval of the settlement." Br. of Resp't at 7.

parties, in part, by mandating that class action settlements be court approved. CR 23(e) provides that:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

CR 23 is identical to its federal counterpart, Fed.R.Civ.P. 23, and thus, federal cases interpreting the analogous federal provision are highly persuasive. *Brown v. Brown*, 6 Wn.App. 249, 252, 492 P.2d 581 (1971). "The primary concern of this subsection is the protection of those class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties." *Officers for Justice*, 688 F.2d at 624 (citing *Collins v. Thompson*, 679 F.2d 168, 172 (9th Cir.1982)); *see also Simer v. Rios*, 661 F.2d 655, 664 (7th Cir.1981); *Mendoza v. City of Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1344 (9th Cir.1980); *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir.1975); *Norman v. McKee*, 431 F.2d 769, 774 (9th Cir.1970); *see generally* 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1797, at 226 (1972)). The requirements of CR 23(e) are for the most part procedural, requiring notice of a proposed settlement be given to class members and that they be given an opportunity to object to the settlement. In this case, class members were also given the opportunity to "opt out."

Although CR 23 is silent in guiding trial courts in their review of class settlements, it is universally stated that a proposed class settlement may be approved by the trial court if it is determined to be "fair, adequate, and reasonable." *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370,

1375 (9th Cir.1993); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 207 (5th Cir.1981); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir.1977). The criteria generally utilized to make this determination include: the likelihood of success by plaintiffs; the amount of discovery or evidence; the settlement terms and conditions; recommendation and experience of counsel; future expense and likely duration of litigation; recommendation of neutral parties, if any; number of objectors and nature of objections; and the presence of good faith and the absence of collusion. 2 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 11.43 "General Criteria for Settlement Approval" (3d ed.1992).

The above list is not exhaustive, nor will each factor be relevant in every case. *Officers for Justice*, 688 F.2d at 625. "The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case." *Id.* This is a delicate, albeit largely unintrusive inquiry by the trial court.

> [T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.

Id. It is not the trial court's duty, nor place, to make sure that every party is content with the settlement.

Indeed, this would contravene the very nature of consensual settlements. Rather, the trial court should look to the possibility of inequitable treatment between class members.

> It may be unavoidable that some class members will always be happier with a given result than others, but potential injustice arises as the distribution of benefits and burdens in a class remedy becomes increasingly unequal. Although maximizing the overall gain is a valid pursuit in resolving a class action, a small minority of the class members may not be asked to bear an unduly disproportional share of the accompanying burdens.

Mendoza, 623 F.2d at 1344.

A reviewing court's role is even more limited than that of the trial court.

> "Great weight is accorded his [the trial judge's] views because he is exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly." In fact, so much respect is accorded the opinion of the trial court in these matters that this Court will intervene in a judicially approved settlement of a class action only when the objectors to that settlement have made a clear showing that the [trial court] has abused its discretion.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 454-55 (2d Cir.1974) (first alteration in original) (quoting *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 34, (3d Cir.1971)). Most importantly,

> *[n]either the trial court nor [an appellate] court is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute,* for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements.
>
> . . . .
>
> Finally, it must not be overlooked that voluntary conciliation and settlement are the preferred means of dispute resolution.

Officers for Justice, 688 F.2d at 625 (emphasis added); *see accord Kaye v. Fast Food Operators, Inc.,* 99 F.R.D. 161 (S.D.N.Y.1983); *Patterson v. Stovall,* 528 F.2d 108 (7th Cir.1976); *Grunin,* 513 F.2d 114; *Grinnell,* 495 F.2d 448; *Boggess v. Hogan,* 410 F.Supp. 433 (N.D.Ill.1975); *Bryan v. Pittsburgh Plate Glass Co.,* 494 F.2d 799 (3d Cir.1974); *Wellman v. Dickinson,* 497 F.Supp. 824 (S.D.N.Y.1980).

This is not to say that a reviewing court should not look to the merits of the Plaintiffs' case, but that review should be limited to assessing rough probabilities of success as they existed at the time of the settlement. As Holland correctly notes, any other approach would directly stifle litigants' willingness to settle class action claims, a result contrary to the policy favoring settlements. Were the rule otherwise,

> "[p]arties would be hesitant to explore the likelihood of settlement apprehensive as they would then be that the application for approval would necessarily result in a judicial determination that there was no escape from liability or no hope of recovery and thus no basis for a compromise."

West Virginia v. Charles Pfizer & Co., 440 F.2d 1079, 1086 (2d Cir.1971) (quoting *Florida Trailer & Equip. Co. v. Deal*, 284 F.2d 567, 571 (1960)).

The facts of this case are illustrative. Holland and the Plaintiffs settled. Notice of the proposed settlement was given to over 750,000 class members, who had an opportunity to object to the trial court that the settlement was not "fair, adequate, and reasonable." In this case, Bebchick did so, but the trial court approved the settlement despite Bebchick's objection. Bebchick appealed, and the court of appeals decided the merits of the trial court's orders preceding the settlement approval, and used its holdings as a basis for determining that the settlement was not "fair, adequate, and reasonable."

This begs the question: If this were procedurally proper, why would a party in Holland's position ever settle a case? Holland settled to avoid litigation, not to be subsumed by it. Under the Court of Appeals' approach Holland bore all the risk. If the Court of Appeals had affirmed the trial court rulings, and thus held that the settlement was fair, adequate, and reasonable to the class, Holland would be bound by the settlement despite the fact that such a ruling would have meant Holland might have been able to avoid all liability had it litigated the case. However, if the trial court's orders were reversed, as they were in this case, and thus the settlement were disapproved, Holland would be back to litigating the case. In essence, it was a no-lose proposition for the class under the Court of Appeals' approach. Either they received a settlement or they went back to trial in a highly advantageous position. This type of result is not

dictated by either the letter or spirit of CR 23. Accordingly, we hold that the Court of Appeals erred by deciding the merits of the trial court's denial of class certification in the first instance.

The remaining question then, is whether the class settlement was "fair, adequate, and reasonable." In reviewing whether the class settlement was "fair, adequate, and reasonable" we apply an abuse of discretion standard to the trial court's finding. *Moore v. Nat'l Ass'n of Sec. Dealers, Inc.*, 762 F.2d 1093, 1106 (D.C.Cir.1985). As noted above, courts generally refer to eight criteria, with differing degrees of emphasis, in making a settlement approval determination: the likelihood of success by plaintiffs; the amount of discovery or evidence; the settlement terms and conditions; recommendation and experience of counsel; future expense and likely duration of litigation; recommendation of neutral parties, if any; number of objectors and nature of objections; and the presence of good faith and the absence of collusion. 2 Newberg & Conte, *Newberg on Class Actions* § 11.43. Those criteria relevant to this suit are evaluated below, each of which, in our opinion, weighs heavily in favor of approval of the settlement as "fair, adequate, and reasonable."

a. Likelihood of Success by Plaintiffs

The likelihood of success by Plaintiffs must be evaluated as it existed at the time of settlement. *See E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 890 (7th Cir.1985) (noting that there was "great uncertainty about the proper resolution of a number of legal issues involved,

any one of which, if resolved in favor of Walker, would result in no recovery."); *Grinnell*, 495 F.2d at 457 (recognizing that there "would have been a serious question as to whether these actions could have been maintained as class actions at all"). At the time of settlement, Plaintiffs were in a situation of great uncertainty regarding the instant suit, and as Holland correctly notes, this weighs heavily in favor of a finding that the settlement was fair, adequate, and reasonable. Holland had a pending summary judgment motion regarding its contractual limitations period, which it had renewed after discovery revealed some of the named plaintiffs may have discovered the facts underlying their cause of action long before filing suit. Additionally, Plaintiffs' motion for class certification had been denied by the trial court and the Court of Appeals had denied interlocutory discretionary review of this order based on a determination that the trial court had not committed "obvious or probable error."

A central issue in this case, from its beginning, has been class certification. It is true that this Court has neither the " 'right [n]or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute.' " *Kaye*, 99 F.R.D. at 163 (quoting *Grinnell Corp.*, 495 F.2d at 456). However, it is equally true that an assessment of the legal obstacles faced by Plaintiffs in this case as to the question of class certification, bears directly on the level of risk plaintiffs faced in receiving no recovery at all.

Holland correctly observes that at the time of settlement Plaintiffs faced an uphill battle in attempting to secure class certification due the trial court's original

denial. As the eleventh circuit has noted, appellate reversal of a trial court's denial of class certification is a rarity:

> [trial] courts have broad discretion with respect to such rulings, and denials of class certification usually stand. . . . Thus, reliance on the possibility of a reversal of the court's certification decision is ordinarily not reasonable.

Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1381 (11th Cir.1998).

Even under the substantive criteria for class certification, it is apparent that Plaintiffs faced significant obstacles. CR 23(b)(3), the provision relating to class certification, requires, in part, a trial court finding that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." CR 23(b)(3). The trial court found certification improper in this case, raising three principal concerns, each of which would be an independent ground to deny certification. First, the court found that there is a significant number of individualized inquiries that would have to be made with respect to Holland's contractual limitations period. Second, the court found that individual issues of proof related to causation and injury by each class member would cause individual issues to predominate over the common issues of fact and law. And third, the need to address choice of law questions for individual class members would make class certification inefficient. Each of these determinations was overturned by the Court of Appeals.

The most significant challenge to class certification faced by the class was the question of whether some, if not most, of the class members' claims would be time barred by reason of Holland's contractual limitations period. Holland's cruise contract states:

> [Y]ou may not maintain a lawsuit against Owner, HALW or the Ship, nor will Owner, HALW or the Ship be liable therefore, unless HALW is provided with written notice of claim within thirty (30) days after conclusion of the Cruise [and] . . . the lawsuit for such claim is commenced not later than one-hundred eighty (180) days after conclusion of the Cruise.

CP at 409.

Indeed, at the time of settlement Holland had a pending summary judgment motion regarding this issue. The Court of Appeals determined, and Bebchick argues, that the United States Supreme Court's class action tolling principles, established in *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 551, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), allow the claims of all class members to proceed, so long as one class member filed within the contractual limitations period (or statute of limitations). According to the Court of Appeals, since named Plaintiff Pickett strictly complied with Holland's contractual limitations period by filing suit within 180 days of the conclusion of her cruise (which ended on January 20, 1996), the claims of all class members were revived.

This argument is based on a fundamental misunderstanding of *American Pipe*. In *American Pipe* the Supreme Court stated:

> A . . . class action is no longer "an invitation to joinder" but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions. Under the circumstances of this case, where the District Court found that the named plaintiffs asserted claims that were "typical of the claims or defenses of the class" and would "fairly and adequately protect the interests of the class," . . . the claimed members of the class stood as parties to the suit until and unless they received notice thereof and chose not to continue. . . . To hold to the contrary would frustrate the principal function of a class suit, because then the sole means by which members of the class could assure their participation in the judgment if notice of the class suit did not reach them until after the running of the limitation period would be to file earlier individual motions to join or intervene as parties. . . .
>
> *Id.* at 550-51.

As later cases have clarified, "[t]he *American Pipe* rule does not operate to revive stale claims, but rather tolls the limitations period on viable claims while the trial court determines the parameters of the class in any possible class action." *Anderson v. Unisys Corp.*, 47 F.3d 302, 308 (8th Cir.1995). Thus, the filing of a class action lawsuit, as one that is representative in nature, preserves the claims of only those persons whose claims were not time barred at the time the class suit was filed. Since the class in the instant suit encompassed all passengers that had traveled on a Holland cruise in the four years preceding the filing of suit, many of the class members claims would be time

barred even under *American Pipe* if Holland's contractual limitations provision is given effect.

Alternatively, the Court of Appeals held that Washington's discovery rule applied to Plaintiffs' CPA claims, and as such, Plaintiffs' "cause of action [is] . . . not . . . deemed to have accrued until the discovery by the aggrieved party of the facts constituting the [CPA violation]." *Pickett*, 101 Wn.App. at 913. *See* RCW 4.16.080(4); *see also Reeves v. Teuscher*, 881 F.2d 1495, 1501 (9th Cir.1989). However, even if this were the case, and Holland's contractual limitations period were valid, there would still be questions of what individual plaintiffs had knowledge of and when they gained such knowledge. This would arguably make class certification impractical. Since the proposed class encompassed all persons completing cruises in the four years preceding the lawsuit (which is the statute of limitations under the CPA), and Holland's contractual limitation period was 180 days, there would still be members of the proposed class whose claims could have lapsed even with application of the discovery rule. This was a significant risk for Plaintiffs at the time of settlement.

The trial court's denial of class certification was also based on its determination that individual questions of causation would make class litigation of Plaintiffs' CPA claims impractical. An actionable private claim under Washington's CPA requires "[a] causal link . . . between the unfair or deceptive acts and the injury suffered by plaintiff." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 793, 719 P.2d 531 (1986). In *Hangman Ridge*, we did not elaborate on the level of proof required to show causation. The issue under the facts of

this case is whether individual reliance and knowledge is required to prove causation. If it is, class certification is most likely impractical because a showing that each class member specifically relied on Holland's alleged misrepresentations would be required.

Holland cites *Nuttall v. Dowell,* 31 Wn.App. 98, 639 P.2d 832 (1982), a pre-*Hangman* Court of Appeals decision, which stands for the proposition that actual reliance is required in a money damages CPA claim based on misrepresentation. In *Nuttall,* the court held that "a party has not established a causal relationship with a misrepresentation of fact where he does not convince the trier of fact that he relied upon it." *Id.* at 111. This is the only Washington authority directly on point (i.e., dealing with a money damages claim based on misrepresentation). Both parties cite to out of state cases supporting their respective positions. *See, e.g., Latman v. Costa Cruise Lines, N.V.,* 758 So.2d 699 (Fla.2000) (holding that under Florida CPA reliance and damages are shown by the fact that person parted with money); *Zekman v. Direct Am. Marketers, Inc.,* 675 N.E.2d 994 (Ill.Ct.App.1997) (finding that a party must have relied on the wrong to some extent); *Weinberg v. Sun Co.,* 740 A.2d 1152 (Pa.Super.1999) (requiring showing that false representation made a difference in a purchasing decision).

Quoting a Court of Appeals decision, *Edmonds v. John L. Scott Real Estate, Inc.,* 87 Wn.App. 834, 942 P.2d 1072 (1997), the Court of Appeals in this case held that "[i]njury and causation are established if the plaintiff loses money because of unlawful conduct." *Pickett,* 101 Wn.App. at 916. Both *Edmonds* and the Court of Appeals in the instant suit cited our decision in *Mason v. Mortgage*

Am., Inc., 114 Wn.2d 842, 792 P.2d 142 (1990), as the basis for this principle. This is debatable. Neither *Edmonds* nor *Mason* stands directly for the proposition for which it is cited. In *Edmonds*, the defendant relied on representations made by the defendant in buying a house. The contract did not alert the plaintiff that the defendant would summarily decide any controversy over earnest money. The defendant's unilateral determination that plaintiff defaulted was deemed an unfair act. Since the plaintiff relied on the representation of defendant in signing the agreement, and lost money, injury and causation were established. In *Mason*, which involved representations made in the purchase of a mobile home, the issue of causation never even arose, and this court's discussion was limited to injury.

Under the posture of this case, we believe it is enough to say that this is a debatable question without a clear answer under Washington law at the time of the parties' settlement, and presented a risk to the Plaintiff class favoring settlement. Moreover, the Court of Appeals, in its original denial of interlocutory discretionary review engaged in a written analysis similar to that outlined above in determining that the trial court had not committed "obvious or probable error" in denying class certification. CP at 1241. The Court of Appeals' written denial was properly considered by the parties in deciding that settlement was warranted, as it foreshadowed the high level of risk attending any subsequent litigation, and most importantly, was relevant to the trial court's determination that the settlement was reasonable.

The final basis for the trial court's denial of class certification was its determination that individual choice

of law questions would predominate. The Court of Appeals held that there was no choice of law problem because the sole claim was under Washington's CPA and individual members of the class could "opt out." *Pickett*, 101 Wn.App. at 912. However, as Holland argues, the United States Constitution puts limits on the application of state law to national class action lawsuits. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985), the Supreme Court held that a state must have " 'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests,' in order to ensure that the choice of [a state's] law is not arbitrary or unfair." *Id.* at 821-22. The Court gave "little credence" to the proposition that plaintiffs "by failing to opt out, evinced their desire to be bound by [a state's] law." *Id.* at 820. However, even under *Phillips Petroleum*'s choice of law requirements an "important element" of determining fairness is "the expectation of the parties." *Id.* at 822.

Bebchick argues that this issue was resolved by reason of Holland's choice of law provision in its cruise contract. Holland's cruise contract states:

> [As to Cruises and as to the Ship segment of your Cruisetour, it] will be construed in accordance with the general maritime law of the United States. As to the non-Ship segment of your Cruisetour, it will be construed in accordance with the laws of the State of Washington, U.S.A. All disputes and matters whatsoever arising under, in connection with or incident to this contract shall be litigated . . . in the courts of the State of Washington, U.S.A. . . . .
>
> CP at 797.

Unlike the Court of Appeals, we merely recognize that all of the above issues injected a high degree of uncertainty into this case for Plaintiffs. The parties decision to avoid the costly and protracted litigation that would inevitably follow, and the very real prospect that Plaintiffs might receive little or no recovery if the trial court were affirmed on any ground, are all factors weighing in favor of settlement approval.

b. Amount and Nature of Discovery and Evidence

At the time of settlement the parties had engaged in two years of extensive discovery.

c. Settlement Terms and Conditions

Under the settlement, members of the class receive fully transferable travel vouchers, redeemable for future Holland cruises, valid for three years from the date of issuance. The voucher amounts vary, depending upon the length of the original cruise and the date of its departure, and range from $10.00 to $50.00. The principal restriction on use of the vouchers is that they must be used for a booking made within 45 days of departure.

The face value of the settlement is over $20 million. However, even were the amount far smaller, "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *City of Detroit*, 495 F.2d at 455. The second circuit has gone so far as to conclude that "there is no reason, at least in theory, why a satisfactory

settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Id.* at n. 2.

Bebchick's only tangible argument against the validity of the settlement is that the vouchers are not sufficiently beneficial to the class because they are unlikely to be used by large numbers of class members. This may or may not be the case. There was evidence that Holland's cruise customers tend to be quite loyal, and that 30-40 percent of each cruise vessel is occupied by prior customers. However, this issue is further mitigated by the fact that the travel vouchers are fully transferable, even though they have no cash value. As Plaintiffs note in their court of appeals briefing,

> [f]or those Class members who choose not to cruise again, the Vouchers can be transferred or sold: (a) to travel agents who do a large volume of business with Holland America who will be most likely to give their repeat cruise customers close to full value for their Vouchers as a mechanism for creating goodwill and increasing business; (b) to cruise consolidators, agents who specialize in buying up berths in bulk to sell at steep discounts at the last minute; (c) through Internet marketing mechanisms; or (d) to a formal market maker. . . .
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> Br. of Resp't at 11.

d. Recommendation and Experience of Counsel

When experienced and skilled class counsel support a settlement, their views are given great weight. *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 175 (5th Cir.1983). There

has been no suggestion by any party that the class received anything other than excellent representation. Indeed, as Holland notes, the trial court went out of its way to point out this fact:

> I guess Holland America ends up paying for both sides but they got their money's worth because. . . . [t]his case has been litigated very professionally from beginning to end. I continued to get a great deal of pleasure in the briefs that are submitted. They are letter perfect.

Report of Proceedings (No. 96-2-10831-6 KNT Sept. 28, 1998) at 116.

e. Reaction of Class

The reaction of the class members to a proposed settlement is one factor in assessing whether or not a settlement is fair, adequate, and reasonable. *Flinn v. FMC Corp.*, 528 F.2d 1169 (4th Cir.1975) (approving settlement where only five members of a class of 253 objected); *Bryan*, 494 F.2d at 803 ("While the proportion of the class opposed to a settlement is one factor to be considered in assessing its fairness, . . . a settlement is not unfair or unreasonable simply because a large number of class members oppose it.").

As Holland correctly asserts, in this case the trial court received fewer than fifty objections to the proposed settlement out of 470,000 class notices sent to more than 750,000 potential class members. This de minimis level of objection is far smaller than that approved by federal courts in similar instances. *See Lelsz v. Kavanagh*, 783 F.Supp. 286, 289 (N.D.Tex.1991) (approving settlement for

class of 5,683 where 370 objected); *Parker v. Anderson*, 667 F.2d 1204, 1207 (5th Cir.1982) (affirming approval of settlement where one class member out of 11 objected); *Grinnell*, 495 F.2d at 462 ("Any claim by appellants that the settlement offer is grossly and unreasonably inadequate is belied by the fact that, from all appearances, the vast preponderance of the class members willingly approved the offer. Only twenty objectors appeared from the group of 14,156 claimants.").

f. The presence of good faith and the absence of collusion

There has been no allegation of bad faith in this case.

Based on the foregoing considerations we reverse the Court of Appeals and approve the settlement as "fair, adequate, and reasonable."

CONCLUSION

We hold that the Court of Appeals erred by deciding the merits of the trial court's denial of class certification in the first instance, rather than confining itself to the question of whether the class settlement was "fair, adequate, and reasonable." We reverse the Court of Appeals and hold that the class settlement is fair, adequate, and reasonable.

SANDERS, J. (dissenting).

The overarching issue is whether the trial court abused its discretion by approving a class action settlement in light of its earlier decision to deny certification of the same class for litigation purposes. The court's

approval of the settlement as fair, adequate, and reasonable is premised on a discounted settlement value due to denial of class certification. This, however, is legally erroneous since class certification for settlement purposes must satisfy a stricter standard than class certification for the purpose of litigation.

There can be little doubt the trial court approved this meager settlement because of its prior decision denying class certification for trial:

> [C]ertainly the legal posture that this case is in I think is instructive on what is or is not a fair and a reasonable and adequate settlement, and you know once the Court denied certification it makes it very difficult to litigate whatever individual interests that each of the individuals may have.
>
> . . . .
>
> So I think that from the standpoint of where the case is that it is a remarkable settlement. . . .

Verbatim Report of Proceedings (Sept. 28, 1998) at 107-08. However, in its final court order approving the settlement the trial court found class certification for settlement purposes to be appropriate:

> This Court on September 22, 1997 found that class certification for trial purposes was inappropriate with respect to causation and damages. However, in the context of deciding whether the Settlement is fair, adequate and reasonable, common questions of law and fact exist and predominate over questions affecting only individual Class members. Therefore, the Class is sufficiently cohesive to warrant adjudication through settlement by representation;. . . .

Clerk's Papers (CP) at 289.

The record demonstrates the trial court's denial of certification for trial was the moving force that motivated the named plaintiffs to enter into settlement negotiations with Holland.

> In light of the denial of plaintiffs' request for discretionary review of the trial court's class certification denial, it appeared that few cruise passengers could establish a [Consumer Protection Act, chapter 19.86 RCW] claim against [Holland] for its deceptive conduct. Thus, plaintiffs had good reasons under the circumstances for entering into the settlement with [Holland]. *Although plaintiffs supported the fairness and adequacy of the settlement at the appellate court, they did so only because the trial court's class certification ruling, coupled with the denial of discretionary review, left them no other real choice.*

Suppl. Br. of Pls./Resp'ts at 18 n. 17 (emphasis added).

In other words, denial of certification for litigation purposes coupled with the Court of Appeals' refusal to review that denial sounded the death knell to the class members' ability to prosecute their claims against Holland in a practical and economic manner. The fact that the named plaintiffs now come before this court *opposing* the very settlement they previously negotiated, and defended below, further evinces their decision to settle was based on the denial of class certification for trial.

Class member Leonard Bebchick here objects to the proposed settlement, and reasonably so. The settlement

would offer discount coupons having virtually no practical value to class members. Although Holland claimed the 1.5 million coupons offered had an aggregate face value of $20 million, the conditions placed on redeeming these coupons, coupled with the nature of Holland's price schedule, ensured only a miniscule portion of these coupons would ever be used, and even then only if a class member paid Holland thousands of dollars for future trips. The coupons ranged in value from $10 to $50 and were subject to a so-called "capacity control" restriction, meaning they could be used only on travels booked less than 45 days from departure. However Holland frequently sells its cruises on an early-purchase, reduced-fare basis. Savings under this early-purchase scheme range as high as 20-25 percent of the ticket price, which sometimes goes as high as $5,000. Naturally, reasonable travelers will not forgo such large savings to receive a coupon credit of only $10 because early-purchase discounts would more than offset whatever illusory benefit might be achieved from the settlement.

Such a settlement makes sense only if there is no alternative. That was the case here because the trial court's denial of class certification for trial, and denial of discretionary appellate review, defeated the only viable alternative available to the class.

Other courts have recognized denial of certification for trial may render the representative plaintiff's individual claim insufficient to warrant the expense of continued litigation. *See, e.g., Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir.1999); *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293 (1st Cir.2000). This realization led to the recent amendment of Federal Rule

of Civil Procedure 23(f) to provide a mechanism whereby appellate courts "can restore equilibrium when a doubtful class certification ruling would virtually compel a party to abandon a potentially meritorious claim or defense before trial." *Waste Management Holdings*, 208 F.3d at 293.

Only by relying on its own erroneous prior decision denying class certification for litigation purposes could the trial court justify approving a settlement which provided little practical benefit to class members. Consequently, if the trial court's original denial of certification for trial was improper, the foundation for its approval of the settlement was similarly flawed, as is our majority's decision to affirm it. The Court of Appeals recognized this, as do I.

Although the majority correctly states "CR 23 is identical to its federal counterpart, Fed.R.Civ.P. 23, and thus, federal cases interpreting the analogous federal provision are highly persuasive," majority at 9, my colleagues miss the seminal case on class settlements: *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). There the Court delineated the three-step approach Fed.R.Civ.P. 23 mandates to certify a class for settlement purposes. CR 23 is identical to Fed.R.Civ.P. 23, and I agree there is no reason a different approach should be taken here. *See Am. Disc. Corp. v. Saratoga W., Inc.*, 81 Wn.2d 34, 37, 499 P.2d 869 (1972); *Brown v. Brown*, 6 Wn.App. 249, 252, 492 P.2d 581 (1971).

Amchem involved a massive class action for asbestos-related injuries during the heyday of asbestos litigation. *Amchem*, 521 U.S. at 597. The proposed class covered

several hundred thousand persons exposed to asbestos. *Id.* The Supreme Court's reasoning, analysis, and holdings on class settlements under Rule 23 are instructive. The parties in *Amchem* proposed a settlement that, much like the settlement at bar, not only settled the claims of the named plaintiffs, but also necessarily precluded every class member who had not opted out from individually pursuing their claims following settlement approval. *Id.* at 597, 603. Like here, the district court only certified the class for "settlement purposes" under Rule 23(b)(3), and then approved the proposed settlement as fair and adequate. *Amchem,* 521 U.S. at 597, 605.

However the Court of Appeals for the Third Circuit reversed because the class could not satisfy the certification requirements of Rule 23(a) and (b). *Georgine v. Amchem Prods., Inc.,* 83 F.3d 610, 634 (3d Cir.1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor,* 521 U.S. 591. In addition to decertifying the class, the Court of Appeals also vacated the injunction prohibiting class members from individually pursuing claims. *Georgine,* 83 F.3d at 635. The court held even though the class action settled, the same certification requirements of Rule 23(a) and (b) must be satisfied as would be the case if it were going to trial. *Georgine,* 83 F.3d at 625.

With slight modification, the Supreme Court affirmed the Court of Appeals decision and adopted much of its reasoning. *Amchem,* 521 U.S. at 619-20. The Court held, as had the Court of Appeals, the certification requirements of Rule 23(a) and (b) must be satisfied *before* a court asked to approve a class settlement can determine the fairness thereof under Rule 23(e). *See Amchem,* 521 U.S. at 613-22.

Under *Amchem* approval of a proposed class settlement requires a three-step approach. All class actions, whether settled or litigated, must first meet the prerequisites in CR 23(a) of numerosity, commonality, typicality, and adequacy of representation. *See Amchem*, 521 U.S. at 613. Second, if all four requirements of CR 23(a) have been met, proponents of a class settlement "must show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *Amchem*, 521 U.S. at 614. Third, if, *and only if*, the certification requirements of both Rule 23(a) and (b) have been satisfied may a court analyze a proposed class settlement for fairness, adequacy, and reasonableness under CR 23(e). *See Amchem*, 521 U.S. at 620-22; *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1025 (9th Cir.1998).

It is important to note the requirements in CR 23(a) and (b) are not for the benefit of the named plaintiffs or the defendants, but for the protection of the absent class members. Although absent class members will never see the inside of the courtroom, or in this case sit at the negotiating table, their legal rights are determined by the outcome.

Neither the trial court, the Court of Appeals, nor today's majority follows the three-step analysis required by CR 23. The majority's opinion is focused entirely on CR 23(e), and does not even consider whether the absent class members received the protection they were due under CR 23(a) and (b). Further, the majority's fairness determination under CR 23(e) is premised on the same erroneous trial court decision to deny class certification for litigation purposes as was the trial court's approval of the settlement.

Quixotically, although the trial court initially declined to certify the proposed class for litigation purposes under CR 23(b)(3), finding individual questions of law and fact to predominate over common questions, it later decided to certify the class *for settlement purposes,* finding:

> (a) The Class is so numerous that joinder of all members is impracticable;
>
> (b) There are certain questions of law or fact common to the above-described Class;
>
> (c) For purposes of settlement, the claims of plaintiffs are typical of the claims of the above-described Class;
>
> (d) The plaintiffs . . . will fairly and adequately protect the interests of the above-described Class in connection with the Settlement;
>
> (e) This Court on September 22, 1997 found that class certification for trial purposes was inappropriate with respect to causation and damages. However, in the context of deciding whether the Settlement is fair, adequate and reasonable, common questions of law and fact exist and predominate over questions affecting only individual Class members. Therefore, the Class is sufficiently cohesive to warrant adjudication through settlement by representation; and
>
> (f) For purposes of Settlement, certification of the above-described Plaintiff Settlement Class is superior to other available methods for the fair and efficient settlement of the claims of the Class.

CP at 289-90. *Cf.* CP at 66; majority at 6. Findings (a) through (d) satisfy the prerequisite numerosity, commonality, typicality, and adequacy of representation requirements of CR 23(a). Findings (e) and (f) satisfy the predominance and superiority findings required by CR 23(b)(3).

This settlement approval is fatally wounded because the trial court found the settlement reasonable *because of* its prior decision to deny the same class certification for litigation purposes. However, the procedural protections in CR 23

> demand undiluted, *even heightened,* attention in the settlement context. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold.

Amchem, 521 U.S. at 620 (emphasis added); *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 846, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999). In the settlement context, as well as in a litigation setting, it is of utmost importance that CR 23(a) and (b) be applied to protect the interests of absent class members. *Amchem,* 521 U.S. at 620. We must recognize CR 23(e) operates *in addition to,* not instead of, the certification requirements of CR 23(a) and (b).

> Subdivisions (a) and (b) focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives. That dominant concern persists when settlement, rather than trial, is proposed.

> The safeguards provided by the Rule 23(a) and (b) class-qualifying criteria, we emphasize, are not impractical impediments – checks shorn of utility – in the settlement – class context. First, the standards set for the protection of absent class members serve to inhibit appraisals of the chancellor's foot kind – class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness.
>
> Second, if a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and permitting class designation despite the impossibility of litigation, both class counsel and court would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer.

Amchem, 521 U.S. at 621. In other words, a fairness hearing under CR 23(e) "is no substitute for rigorous adherence to those provisions of the Rule 'designed to protect absentees.' " *Ortiz*, 527 U.S. at 849 (quoting *Amchem*, 521 U.S. at 620).

We must also recognize certification of a class for settlement purposes in an action for money damages implicates the Seventh Amendment rights of the absent class members to a trial by jury. *Ortiz*, 527 U.S. at 846. Class actions are representative suits that, when settled, impose a preclusive agreement by the named plaintiffs on themselves as well as absent class members. This necessarily precludes absent class members who possess valid legal claims from independently exercising their right to their day in court. *Id.*

Juxtapositioning the trial court's findings to support denial of class certification for trial with those made when it approved the settlement, the contradiction makes evident that the trial court misapplied CR 23. Whether a class action is headed for trial or for settlement, CR 23 imposes the same requirements. And here, the class proposed for trial was the same as the class proposed for settlement. *Compare* CP at 32 (setting out the proposed class for trial), *with* CP at 289 (setting out the approved class for settlement purposes). If the rule is the same and the class is the same, the two decisions by the trial court on the certification issue must be the same. But here they were not; they were 180 degrees apart. This is plain and palpable error.

As a result of the divergent findings the trial court improperly devalued the merits of the case by factoring in its erroneous decision to deny certification for trial. The trial court's decision to certify the class for settlement demonstrates its decision to deny certification for trial was error. Thus, to discount the value of the plaintiffs' case on this ground was untenable. The trial court abused its discretion. I would set aside the settlement and remand for further appropriate proceedings.

Court of Appeals of Washington,
Division 1.

Francine PICKETT, Brian Cohen, Jack Masin and Belle Masin, individually and on behalf of all others similarly situated, Respondents,
Leonard Bebchick, Appellant,
Joseph Hess, Leona Hess, Tom Crago and Linda Crago, Intervenors,
v.
HOLLAND AMERICA LINE-WESTOURS, INC., Respondent.

Nos. 43582-5-I, 43648-1-I.

Aug. 14, 2000.

Leonard N. Bebchick, Washington, D.C., for Appellant.

James F. Whitehead, Seattle, for Intervenors.

Steve W. Berman, George W. Sampson, Keri L. Greenheck, Hagens Berman LLP, Dan Drachler, Stephen M. Rummage, Jason C. Klein, Seattle, for Respondents.

APPELWICK, J.

Plaintiffs filed a class action lawsuit under the Washington Consumer Protection Act (Washington CPA) alleging that Holland America misrepresented 'port charges and taxes' assessed as a pass through of government charges, taxes, and fees to customers purchasing cruise tickets. Plaintiffs' motion for certification of the class was denied on the basis of individual choice of law questions, and on the basis of individual issues of causation and injury predominating over common issues. A "class" was

certified for settlement purposes only. Plaintiffs reached an agreement on a proposed settlement with Holland America that provided plaintiffs vouchers for discounts on future cruise tickets and required Holland America to make assurances of voluntary compliance of certain advertising practices. One member of the class moved to intervene, and appealed the trial court's initial denial of class certification and challenged the fairness of the proposed settlement. Holland America appealed the denial of its summary judgment motion that asserted the untimely filing of the lawsuit. We find that Washington law applies to the plaintiffs' claims. The lawsuit was timely filed and Holland America's motion for summary judgment was properly denied. Levy of mandatory, add-on "port charges and taxes" on passengers was part of a common scheme. Holland America charged amounts in excess of actual port charges and taxes and kept a portion of the funds for corporate purposes. The causation and damages requirements of a Washington CPA action inhere in the fact that plaintiffs purchased the cruise tickets. Common issues of causation and damages predominate over individual issues. We reverse the denial of class certification. We conclude that the settlement agreement is not fair and reasonable in light of our reversal of the denial of the class action certification of the Washington CPA claim. We therefore remand for further proceedings.

FACTS

Defendant-Respondent Holland America Line-Westours, Inc. (Holland America or HALW) is a Seattle, Washington, corporation that provides cruises within and

between the United States, international waters, and foreign jurisdictions. Plaintiffs-Respondents Francine Pickett, Brian Cohen, Jack Masin and Belle Masin are representatives of a nationwide class of cruise passengers. Plaintiffs all traveled on a Holland America cruise and paid "port charges and taxes."

Plaintiffs filed a class action suit on April 19, 1996, on behalf of all persons who had traveled on a Holland America cruise in the preceding four years and paid "port charges and taxes" included in the cruise price. Plaintiffs claimed that Holland America's marketing literature and cruise contract misrepresented the nature of the "port charges and taxes" assessment. The complaint alleged Washington CPA violations, negligent misrepresentation, and unjust enrichment. Plaintiffs alleged that Holland America represented the assessments as mandatory taxes and fees levied by port authorities and governmental agencies, when in fact, the assessments were knowingly and deliberately collected and kept by Holland America for corporate purposes. Plaintiffs sought recovery of the "port charges and taxes" charged by Holland America in excess of the actual port charges and taxes assessed by the ports or governments.

On July 24, 1996, Holland America moved for partial summary judgment, asserting that the suit was time barred by the cruise contract's limitations period. On October 31, 1996, Judge Armstrong of the King County Superior Court denied that motion finding that Washington law, not maritime law, applied. Judge Armstrong stated that the "factual record is not sufficiently clear to determine whether plaintiffs knew or reasonably should

have known what the port charges and taxes were." The court deferred a ruling on certification.

Holland America petitioned for discretionary review. Commissioner Kallas denied review on February 20, 1997, on the grounds that plaintiff Pickett had strictly complied with the terms of Holland America's contractual limitation, and that her filing would satisfy the contractual limitation for all plaintiffs, if the class were certified for trial.

Plaintiffs renewed their motion for class certification. Plaintiffs filed a supplemental brief in support of class certification in May 1997, seeking certification only of their Washington CPA claim. The case was transferred to Judge Jay White of the King County Superior Court. On September 22, 1997, Judge White denied class certification finding that: (1) adjudication requires the court to engage in individual choice of law analysis; (2) individual issues as to causation and injury predominated over common class issues; and (3) the question whether the contractual limitations period bars the plaintiffs' claim raises individual issues that predominate over common questions.

Plaintiffs petitioned for discretionary review of the superior court order denying their motion for class certification. Plaintiffs argued that causation may be shown by merely proving that defendant's conduct had a capacity to deceive a substantial portion of the public. Commissioner Kallas denied the motion on January 22, 1998. Commissioner Kallas reasoned that in a Washington CPA action based on misrepresentation, reliance must be shown to prove causation.

Holland America again moved for summary judgment on January 28, 1998. Before the court ruled on the motion, the plaintiffs and Holland America reached a settlement. The settlement required that the trial court certify the class for settlement purposes only. The settlement stipulated that the plaintiffs receive vouchers discounting future Holland America cruises in exchange for release of their claims. The settlement also required that Holland America enter into an Assurance of Voluntary Compliance with the Florida Attorney General regarding advertising methods throughout the United States.

A voucher's value depends on the year that the member traveled and the duration of the cruise. Voucher amounts range from $10 to $50, and may be applied against the lowest fare available. The vouchers are valid for three years from the date of issuance, but may be used only for bookings made within forty-five days of departure. The vouchers do not have a cash redemption value, but are fully transferable. The vouchers may be stacked up to $50 for seven to fourteen day cruises and up to $100 for cruises of fifteen days or longer.

On April 21, 1998, the trial court provisionally certified a class for settlement purposes and preliminarily approved the settlement. Additionally, the court ordered that notice be sent to putative class members of the settlement and advising of their rights to opt out, object, and attend the fairness hearing. Over 470,000 notices were sent to approximately 750,000 potential class members. Fewer than fifty objected to the proposed settlement. Of these, about a dozen wrote in support of

Holland America. Leonard Bebchick was one of the recipients of the notice. Bebchick objected to the settlement claiming it was unfair, inadequate and unreasonable.

On October 5, 1998, the trial court conducted a fairness hearing to consider whether to approve the proposed settlement. The court heard argument from Bebchick and other objectors. The trial court approved the settlement as fair and reasonable. Bebchick moved to intervene as an individual class member plaintiff for the purposes of seeking appellate review of the court's approval of the settlement and its denial of class certification. The petition was granted on reconsideration.

ANALYSIS

Whether the trial court properly denied class certification to plaintiffs' Washington CPA action and properly approved the settlement agreement turns on four issues: (1) the choice of law of the plaintiffs' claims; (2) whether the suit was timely filed under the contractual limitations period; (3) whether damages and causation can be proven in a class action; and (4) whether the settlement agreement was reasonable.

Choice of Law

We must first determine what is the governing law. Bebchick contends that the trial court erred in finding that the plaintiffs' claims would require an individual choice of law analysis to determine the governing law.

First, Bebchick argues that Washington law governs because it is the express choice of law under the cruise

contract. He claims that Judge Armstrong's order denying Holland America's summary judgment motion established that Washington law governed. Plaintiffs and Holland America entered into a cruise contract that stipulated terms and conditions. Paragraph fifteen provided terms regarding the governing law:

> As to Cruises and as to the Ship segment of your Cruisetour, it will be construed in accordance with the general maritime law of the United States. As to the non-Ship segment of your Cruisetour, it will be construed in accordance with the laws of the State of Washington, U.S.A. All disputes and matters whatsoever arising under, in connection with or incident to this contract shall be litigated . . . in the courts of the State of Washington, U.S.A., to the exclusion of the courts of any other state or country.

In denying Holland America's summary judgment motion, Judge Armstrong found that "the gravamen of plaintiff's claim is the alleged unfair and deceptive conduct which induced plaintiffs to enter into a contract. The alleged conduct did not concern the cruise or the ship segment of the cruise tour and is therefore . . . governed by the law of Washington."

Second, Bebchick contends that Washington law governs even if we apply a choice of law analysis. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985), the Supreme Court addressed the requirements for the forum state's substantive law to govern common issues in a nationwide class action. The Court held that the forum state must have " 'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class,

contacts 'creating state interests,' in order to ensure that the choice of . . . law is not arbitrary or unfair." *Shutts*, 472 U.S. at 821-22, 105 S.Ct. 2965 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13, 101 S.Ct. 633, 639-40, 66 L.Ed.2d 521 (1981)). In *Baffin Land Corp. v. Monticello Motor Inn*, 70 Wash.2d 893, 899, 425 P.2d 623 (1967), the Washington State Supreme Court adopted the significant relationship test to determine the contract choice of law. Therefore, the law of the state that has the most significant relationship with the contract governs the validity and effect of the contract. *Baffin Land Corp.*, 70 Wash.2d at 899, 425 P.2d 623. The court stated that the "rule we approve here also gives much more emphasis to the desires and expectations of the parties, as the state with the most significant relationship is the state chosen by the parties, if an actual, valid choice is made." *Baffin Land Corp.*, 70 Wash.2d at 899, 425 P.2d 623.

Holland America claims that individual issues predominate over common issues because individual choice of law analysis is required for each plaintiff. Holland America relies on several cases in arguing that individual choice of law issues predominate. In *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1011, 1016 (D.C.Cir.1986), *cert. denied*, 482 U.S. 915, 107 S.Ct. 3188, 96 L.Ed.2d 677 (1987), a district court conditionally certified a class of plaintiffs in an action under the Magnuson-Moss Warranty Act, finding that individual choice of law issues did not predominate where the federal Act alone covered the class members claims. The Court of Appeals vacated the class certification, holding that the federal Act only supplemented state law and did not alone cover the class members claims. Therefore, the application of varying state

law was required. *Walsh*, 807 F.2d at 1011-12. In *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir.1996), the Court of Appeals decertified a class action brought by plaintiffs against tobacco companies. The court found that individual choice of law issues predominated in a diversity class action asserting eight causes of action, including the novel tort of nicotine addiction.[1] *Castano*, 84 F.3d at 744.

Here, the class certification is based on one cause of action, the Washington CPA. The application of this law is not complicated by any state law variations or multiple causes of action as are the cases relied on by Holland America. Therefore, we agree with Judge Armstrong that the cruise contract's choice of law is Washington. Holland America provided in its contracts that Washington law applied to non-ship segments of the cruise tour and that venue was exclusively in Washington. Plaintiffs entered into contracts containing those terms. Plaintiffs accepted the terms for substantive choice of law and for venue, and filed their lawsuit in King County, Washington, in compliance with those terms. Plaintiffs' claims as amended are solely for certification of a class action for purposes of damages arising from Holland America's

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[1] Holland America cites other cases that were complicated by the application of various causes of action involving the laws of many states: *Andrews v. AT & T*, 95 F.3d 1014 (11th Cir.1996) asserting a federal RICO claim, violations of gaming laws of many states and fraudulent misrepresentation); *In re American Medical Sys.*, 75 F.3d 1069 (6th Cir.1996) (asserting state law claims of strict liability, negligence, fraudulent misrepresentation, failure to warn and breach of warranty); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3rd Cir.1996) asserting eight different causes of action).

violation of the Washington CPA. Plaintiffs' claims accept and invoke Washington State law.

Whether or not the class is certified, the result is that there is no choice of law issue. Potential class members who do not accept certification of the class for the limited purpose of the Washington CPA may opt out of the class. Should decisive numbers opt out, the court may reconsider the certification of the class. However, as the case was pleaded, Washington law[2] would apply to the claim of every member of the plaintiff class.

We find that the trial court abused its discretion in denying class certification on choice of law grounds. Having reached this result, we need not address the argument that Holland America was estopped to deny its contract choice of law provision and to assert that individual choice of law questions prevail.

Contractual Limitations Period

Holland America contends that the plaintiff class did not comply with the contractual limitations period. The cruise contract provided time limits for noticing claims and filing lawsuits against Holland America. Paragraph two states that lawsuits against Holland America, based on claims not governed by 46 United States Code Section

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[2] Because Washington law governs, this is a consumer contract, not a maritime contract. All terms are given their plain meaning as understood by the public at large. Therefore, Holland America's claim that "port charges" as understood in maritime law are more than government charges, constituting a variety of port-related expenses, has no place here.

183b, may not be maintained unless Holland America "is provided with written notice of claim within thirty (30) days after conclusion of the Cruise or Cruisetour, the lawsuit for such claim is commenced not later than one hundred eighty (180) days after conclusion of the Cruise or Cruisetour. . . . " Holland America claims that the contractual limitations period is enforceable.

In denying discretionary review of Judge Armstrong's order, Commissioner Kallas relied on *Yollin v. Holland America Cruises, Inc.*, 97 A.D.2d 720, 468 N.Y.S.2d 873 (1983), where the trial court denied class certification of plaintiff's claims. In Yollin, the plaintiff had commenced the action within the contractual limitations period, but the trial court found that all other passengers were time barred from commencing an action and were therefore precluded from membership in the proposed class action. *Yollin*, 97 A.D.2d at 720, 468 N.Y.S.2d 873. Although the appellate court upheld the denial of certification on other grounds, it held that the "timely commencement of the action by plaintiff herein satisfied the purpose of the contractual limitation period as to all persons who might subsequently participate in the suit as members of a class." *Yollin*, 97 A.D.2d at 720, 468 N.Y.S.2d 873 (citing *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 551, 94 S.Ct. 756, 765, 38 L.Ed.2d 713 (1974)). The commencement of a class action "suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *American Pipe*, 414 U.S. at 554, 94 S.Ct. 756.

Here, class representative Pickett complied with the contractual limitations period and, therefore, satisfies the

contractual limitations for all other plaintiffs properly within the class. Pickett's cruise with Holland America concluded on January 20, 1996. The complaint was filed less than 180 days later, on April 19, 1996. Under *American Pipe*, the commencement of the original lawsuit tolls the running of the statute of limitations for all members who make timely motions to intervene. *American Pipe*, 414 U.S. at 553, 94 S.Ct. 756. The statute remains tolled for all members of the putative class until class certification is denied. *Crown, Cork & Seal Company v. Parker*, 462 U.S. 345, 353-54, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983). The designated plaintiff class coincides with those purchasing within the contractual limitations period.

Furthermore, because Washington law applies, the time limits are not strictly enforceable. "An action for relief upon the ground of fraud, the cause of action in such case not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." RCW 4.16.080(4). This rule has been applied to the Washington CPA's limitation provision. *Reeves v. Teuscher*, 881 F.2d 1495, 1501 (1989). Judge Armstrong ruled that "the plaintiff must have an opportunity to reasonably discover the elements of his cause of action. The factual record is not sufficiently clear to determine whether plaintiffs knew or reasonably should have known what the port charges and taxes were." Even if Pickett had not timely filed her claim within the contractual limitations period, the limitations period is not strictly enforceable because Washington's discovery period applies.

We hold that Pickett complied with the contractual limitations period and, therefore, saved the claim for the

plaintiff class. A Washington CPA action carries a four-year statute of limitations. RCW 19.86.120. The designation of the plaintiff class also complied with and encompassed only the statute of limitations period. The summary judgment sought by Holland America was properly denied. The trial court abused its discretion by concluding that individual questions predominated over common questions with respect to contractual limitations.

Class Certification

We next turn to whether the requirements for class certification were met. The trial court denied the motion for certification of plaintiffs' Washington CPA claim on the additional grounds that individual issues of injury and causation predominate over common questions.

Bebchick assigns manifest error to the trial court's findings. He argues that causation and injury flow inexorably from Holland America's deceptive act. Bebchick contends that the factor of individual causation, as envisioned by *Hangman Ridge,* is not meaningful in this case where the deceptive act is allegedly not a material factor in the consumer's purchasing decision. He argues that the mere purchase of a cruise is evidence of causation. Bebchick urges the court to adopt a standard for causation that governs class actions under the Washington CPA. Otherwise, the ability to bring an action against Holland America, where individual loss is not high, is effectively lost.

Holland America claims Bebchick puts the cart before the horse. Holland America contends the issue of certification for trial is moot if the settlement is affirmed.

Holland America argues that even if the settlement were invalid, the individual issues in the case predominate over the common ones. Holland America presents deposition testimony that demonstrates plaintiffs' lack of knowledge of "port charges and taxes" when purchasing cruise tickets. Holland America argues that ignorance of the "port charges and taxes" precludes a finding of causation because the plaintiffs' could not rely on the alleged deceptive practices. In short, Holland America contends that there is no cause of action to base a class action upon.

A decision on class certification rests in the sound discretion of the trial court and cannot be overturned absent an abuse of discretion. *Lacey Nursing Ctr., Inc. v. Department of Revenue*, 128 Wash.2d 40, 47, 905 P.2d 338 (1995).

Civil Rule (CR) 23(a) requires that a class action: (1) consist of members of a class that are so numerous that joinder is impracticable; (2) possess common question of law or fact; (3) contain typical claims or defenses; and (4) that the representative parties fairly and adequately represent the interests of the class. In addition, a class action must also meet the requirements of CR 23(b)(1), (2) or (3). *Lacey Nursing*, 128 Wash.2d at 47, 905 P.2d 338. CR 23(b)(3) requires that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members. . . . " The specific requirements set forth in CR 23 must be met before a class is certified. *Lacey Nursing*, 128 Wash.2d at 47, 905 P.2d 338; *DeFunis v. Odegaard*, 84 Wash.2d 617, 622, 529 P.2d 438 (1974).

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful under the Washington CPA. RCW 19.86.020. "Any person who is injured in his or her business or property by a violation of RCW 19.86.020 . . . may bring a civil action . . . to recover the actual damages sustained. . . . " RCW 19.86.090. The purpose of the Washington CPA is to protect the public and foster fair competition, and it "shall be liberally construed that its beneficial purposes may be served." RCW 19.86.920.

The following elements are required for a plaintiff to establish a private cause of action under the Washington CPA: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 780, 719 P.2d 531 (1986); *Eriks v. Denver*, 118 Wash.2d 451, 463, 824 P.2d 1207 (1992). In denying certification, the trial court accepted that common issues of law or fact existed as to the first three elements of a Washington CPA action. The trial court found lacking the last two elements, causation and injury.

Causation

A Washington CPA action requires a showing that plaintiff was injured in his or her "business or property." RCW 19.86.090; *Hangman Ridge*, 105 Wash.2d at 792, 719 P.2d 531. "A causal link is required between the unfair or deceptive acts and the injury suffered by plaintiff." *Hangman Ridge*, 105 Wash.2d at 793, 719 P.2d 531. A plaintiff

establishes causation if he shows the trier of fact that he relied upon a misrepresentation of fact. *Nuttall v. Dowell*, 31 Wash.App. 98, 111, 639 P.2d 832 (1982). The causation requirement is met where the defendant "induced" the plaintiff to act or refrain from acting. *Anhold v. Daniels*, 94 Wash.2d 40, 46, 614 P.2d 184 (1980); *Hangman Ridge*, 105 Wash.2d at 793, 719 P.2d 531.

Injury and causation are established if the plaintiff loses money because of unlawful conduct. *Edmonds v. John L. Scott Real Estate*, 87 Wash.App. 834, 847, 942 P.2d 1072 (1997); *Mason v. Mortgage America, Inc.*, 114 Wash.2d 842, 854, 792 P.2d 142 (1990).

Each plaintiff signed a cruise contract with Holland America. Paragraph three of the contract provided the following:

> **Additions to Fare/Port Charges/Taxes:** . . .
>
> (b) Similarly, the amount specified in the Holland America Line brochure for port charges and taxes was based upon the amount of governmental charges, taxes and fees in existence at the time of printing. If increases have occurred or should hereafter occur in those amounts, Owner and HALW reserve the right to require you to pay the additional amounts as a condition of taking the Cruise or Cruisetour. No right of cancellation exists under these circumstances.

The named plaintiffs' deposition testimony indicates that they had limited knowledge of the port charges and taxes provision in the cruise contract. Belle Masin did not recall any discussions regarding port charges and taxes. Francine Pickett could not recall reading paragraph three of the cruise contract. Brian Cohen did not recall whether

he read paragraph three of the cruise contract before or after the cruise. Holland America asserts that the plaintiffs cannot establish that they were "induced" by a provision that the plaintiffs were not even aware of at the time of contracting. Therefore, no consumer protection claim is possible.

As to injury to the plaintiff class, discovery[3] established Holland America collected millions of dollars per year in revenue for port charges and taxes, in excess of what it actually paid in port charges and taxes. The discovery established Holland America included a category of "[o]ther HALW [c]osts" and a markup margin on top of the actual or projected port fees and taxes. Passengers were not told that "[o]ther HALW [c]osts" nor any corporate markup or contingency was being collected from them. Passengers were told only that they must pay the fees as a condition of taking the cruise, and that they could not cancel their cruise.

In a comparable case involving the Florida consumer protection statute, *Latman v. Costa Cruise Lines, N.V.*, 758 So. 2d 699 (2000), the Florida Court of Appeals reversed the trial court's denial of class certification. In *Latman*, plaintiffs asserted that Costa Cruise Lines charged "port charges," but kept a portion of the charge for corporate purposes. Costa Cruise Lines argued that a class action was improper where the consumer protection statute requires a showing of reliance and damages that necessarily entails case-by-case adjudication. *Latman*, 758 So.

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[3] The actual discovery documents have been filed under seal to protect the competitive interests of Holland America.

2d at 701-02. The court held that "[r]eliance and damages are sufficiently shown by the fact that the passenger parted with money for what should have been a 'pass-through' port charge, but the cruise line kept the money." *Latman*, 758 So. 2d at 703.[4] The court analogized Costa Cruise Lines port charge to a company systematically overcharging its customers on sales tax, and keeping a portion of the sales tax charge for itself. Even though consumers may not have paid attention to the sales tax or willingly agreed to pay the purchase price, including the sales tax, the claim is actionable under the Florida consumer protection statute. *Latman*, 758 So. 2d at 703.

Bebchick cites several class action cases that analyze the reliance issue. In *Amato v. General Motors Corp.*, 11 Ohio App. 3d 124, 463 N.E.2d 625 (1982), plaintiffs brought a class action against General Motors (GM) claiming GM wrongfully substituted Oldsmobile manufactured engines with Chevrolet manufactured engines, where dealers represented Oldsmobile automobiles were equipped with the former. The Ohio Court of Appeals reviewed the trial court's class certification of plaintiffs' claim under the Ohio Consumer Sales Practices Act (OCSPA). The court held that a cause of action under the OCSPA does not require individual proof that plaintiffs were exposed to the misrepresentation, because such a requirement "would result in the utter negation of the fundamental objectives of class-action procedure. . . ." *Amato*, 11 Ohio App. 3d at 127, 463 N.E.2d 625. Further, in

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[4] *See also Renaissance Cruises, Inc. v. Glassman*, 738 So.2d 436 (1999), affirming the trial court's class certification of plaintiffs' action for deceptive trade practices.

affirming the trial court's certification of the class action, the court held that "proof of reliance may be sufficiently established by inference or presumption from circumstantial evidence to warrant submission to a jury without direct testimony from each member of the class." *Amato*, 11 Ohio App. 3d at 128, 463 N.E.2d 625. The *Amato* court relied on *Vasquez v. Superior Court of San Joaquin County*, 4 Cal. 3d 800, 814, 484 P.2d 964, 94 Cal.Rptr. 796 (1971), where the court held that "if the trial court finds material misrepresentations were made to the class members, at least an inference of reliance would arise as to the entire class."

In *Dix v. American Bankers Life Assurance Co. of Florida*, 429 Mich. 410, 415 N.W.2d 206 (1987), the Michigan Supreme Court reversed the trial court's dismissal of a class action based on the state's Consumer Protection Act. The court held that "members of a class proceeding under the Consumer Protection Act need not individually prove reliance on the alleged misrepresentations." *Dix*, 429 Mich. at 418, 415 N.W.2d 206. The court reasoned that the plaintiffs' claims under the Consumer Protection Act would be manageable in a class action because the alleged misrepresentations "are all substantially similar and are all part of a common scheme. . . ." *Dix*, 429 Mich. at 418, 415 N.W.2d 206.

Holland America relies on cases where class certification was denied for actions based on deceptive trade practices. In *Ex parte Exxon Corp.*, 725 So.2d 930 (Ala.1998), the Alabama Supreme Court granted Exxon's mandamus petition challenging the trial court's class certification of plaintiffs' claim regarding allegedly deceptive marketing practices. But in *Exxon*, the court held that

the state consumer protection statute specifically prohibited class actions based on deceptive trade practices.[5] *Exxon*, 725 So. 2d at 933. Here, the Washington CPA statute does not specifically prohibit class action suits. In *Darms v. McCulloch Oil Corp.*, 720 F.2d 490, 493 (8th Cir.1983), a case involving various allegations of fraud in the sale of land, the court affirmed denial of class certification, finding that a class action would not be superior to other available methods of adjudication as required under CR 23(b)(3). The court stated that the purchase of land by each plaintiff "was a separate transaction, and that totally separate oral and written representations by the defendants allegedly caused the injuries to each plaintiff." *Darms*, 720 F.2d at 493. Similarly, in *Shivangi v. Dean Witter Reynolds, Inc.*, 107 F.R.D. 313, 325 (S.D.Miss.1985), the court affirmed a denial of class certification where securities brokers and executives made individual and distinct representations to the plaintiff class.

Holland America relies on authority where there is no common set of operative facts that has established liability. Here, purchaser-plaintiffs' payment of "port charges" is part of a common factual scheme. Purchase of a cruise ticket is the single event that occasioned each plaintiff's injury. Causation inheres in the fact that the plaintiffs purchased cruise tickets. Holland America overstated and retained a portion of the funds it had misrepresented were the amount of pass through charges for

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[5] Alabama law provided that "[a] consumer or other person ringing an action under this chapter may not bring an action on behalf of a class. . . . " *Exxon*, 725 So.2d at 933 n. 4.

port charges and taxes. We need not engage in an inquiry whether each plaintiff would have purchased a cruise ticket had they known about the port charges and taxes. We simply hold that Holland America cannot impose on passengers fees, which are not port charges and taxes, and yet call them government charges, taxes, and fees – pass-through charges – when they are not. The Washington CPA should be liberally construed to protect the public and foster honest competition. *Griffith v. Centex Real Estate Corp.*, 93 Wash.App. 202, 213, 969 P.2d 486 (1998); RCW 19.86.920. We find that the cases cited by appellant are persuasive. We hold that common issues as to causation clearly predominate over individual ones. Any other interpretation would effectively undermine class actions based on the Washington CPA.

Damages

We also disagree with the trial court's finding that individual issues of injury predominate over common questions. Individual questions of damages are no barrier to class certification if "computing individual damages will be virtually a mechanical task," *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir.1975), or "capable of mathematical or formula calculation." *Windham v. American Brands, Inc.*, 565 F.2d 59, 68 (4th Cir.1977), *cert. denied*, 435 U.S. 968, 98 S.Ct. 1605, 56 L.Ed.2d 58 (1978) (quoting Practical Law Institute, *Current Problems in Federal Civil Practice*, 491 (1975)). Cruise ticket sales are standardized transactions conducted by travel agencies throughout the world. The choices available to ticket buyers are limited. Purchasing cruise tickets does not involve a unique activity that

interferes with determining damages. Proving, calculating, and distributing damages is a clerical task that a master may ascertain by reviewing a roster of class plaintiffs. The amount of port charges or taxes paid by each plaintiff can be determined by simple arithmetic. Further, it appears the amount of excess charges may be available on a per cruise basis from already existing Holland America records. Nothing in the statute's provision for damages requires individual determinations. In this class action, the plaintiffs' damages do not constitute individual issues that predominate over common questions.

Summary

Whether a particular action gives rise to a violation under the Washington CPA is reviewable as a question of law. *Griffith*, 93 Wash.App. at 214, 969 P.2d 486; *Leingang v. Pierce County Med. Bureau*, 131 Wash.2d 133, 150, 930 P.2d 288 (1997). The trial court erred in finding that individual issues predominate over common issues as to causation and damages. In light of these errors of law, the trial court abused its discretion in denying certification of the plaintiffs' Washington CPA claim.

Reasonableness of the Settlement

A proposed class settlement may be approved if the trial court determines it is "fair, adequate and reasonable." *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir.1993). The trial court's approval of a settlement may be disturbed only upon a clear showing of abuse of discretion. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir.1992).

Bebchick challenges the fairness and reasonableness of the settlement on grounds that the trial court failed to consider evidence on the value of the settlement, and failed to provide fundamental due process by denying the opportunity to call and examine witnesses during the fairness hearing. Holland America contends that the trial court properly exercised its discretion by considering factors such as the strength of the plaintiffs' case and the amount of the settlement offer. Holland America further argues that affirming the settlement renders the issue of whether the trial court properly denied the class certification moot.

The trial court considers various factors in deciding the fairness of a class action settlement agreement. The court should consider (1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in the settlement; (5) the stage of the proceedings; and (6) the reaction of the class members to the proposed settlement. *Class Plaintiffs*, 955 F.2d at 1291; *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615, 625 (9th Cir.1982).

After balancing these factors, the trial court found the settlement agreement fair and reasonable. However, the trial court's analysis was based upon its previous denial of a certifiable class for the purchaser-plaintiffs' Washington CPA claims. We have reversed as a matter of law or as an abuse of discretion each of the trial court's reasons for denial of class certification. This clears the way for certification of the class action by the trial court on remand. This dramatically changes the facts and will undoubtedly change the analysis of each factor by both

the court and the plaintiffs' class. Accordingly, we vacate the trial court approval of the proposed settlement.

In sum, we reverse the trial court's denial of class certification of plaintiffs' Washington CPA claims. We remand to the trial court for further proceedings consistent with this opinion.

Attorney Fees

If the appellant prevails on the consumer protection claims on remand, having prevailed in this appeal, the trial court shall award reasonable attorney fees and costs incurred in this appeal.

Reverse and remand.

ELLINGTON, J., and WEBSTER, J., concur.

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

FRANCINE PICKETT, BRIAN COHEN, JACK MASIN, and BELLE MASIN, individually and on behalf of all others similarly situated, Plaintiffs, v. HOLLAND AMERICA LINE – WESTOURS INC., Defendant.	NO. 96-2-10831-6 KNT ORDER DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

This matter came before the Court on the Plaintiffs' Motion for Class Certification. The Court has read and considered the papers filed in support of and in opposition to the motion, including each party's supplemental briefing on class certification and the Declarations of George Sampson, Bruce E.H. Johnson and Stephen M. Rummage, together with attachments to those declarations. The Court has also heard oral argument from counsel of record. Based upon those materials, as well as the other files and records of this case, the Court finds as follows:

1. Adjudication of plaintiffs' class claims would require the Court to engage in a choice of law analysis to determine what law governs the claims of each absent class member and then, following that analysis, to apply the law of many jurisdictions to the class claims. Given

the individual questions that such a process would raise, plaintiffs have failed to carry their burden of showing that issues common to the class predominate over individual issues. To the contrary, it appears that individual issues would predominate.

2. Even if the law of a single jurisdiction (such as Washington) governed the claims of all members of the proposed class, individual issues of *injury and/or* causation, ~~and reliance~~ *or either of them /s/ JW* would predominate over common questions that might be raised by class claims under the Consumer Protection Act.

3. Even if the prerequisites to class certification could be otherwise satisfied, the question of whether the claims of each member of the putative class are barred by the applicable contractual limitations period raises individual issues that would predominate over common questions.

~~4. Based on their relationship with proposed class counsel, the named plaintiffs would not be adequate representatives of the interests of the absent members of the putative class.~~ */s/ JW*

NOW, THEREFORE, IT IS ORDERED that Plaintiffs' Motion for Class Certification should be, and it hereby is, DENIED.

DONE this 22d day of September, 1997.

/s/ Jay White
THE HONORABLE JAY WHITE
Superior Court Judge

[Hand notations by the Court are shown in italics.]

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

FRANCINE PICKETT, BRIAN COHEN, JACK MASIN and BELLE MASIN, individually and on behalf of all others similarly situated, Plaintiffs, v. HOLLAND AMERICA LINE – WESTOURS INC., Defendant.	No. 96-2-10831-6KNT ~~[PROPOSED]~~ FINAL JUDGMENT AND ORDER OF DISMISSAL WITH PREJUDICE

THIS MATTER has come before the Court for final approval of the proposal settlement (the "Settlement"). The Court has considered all papers filed and proceedings had herein, and otherwise is fully informed in the premises, and has determined that the proposed Settlement should be approved as fair and reasonable. The Court hereby enters this Final Judgment, which constitutes a final adjudication of this matter on the merits. Good cause appearing therefor, it is hereby

ORDERED, ADJUDGED AND DECREED that:

1. This Court has jurisdiction over the subject matter of this litigation with respect to all claims and over all parties to this litigation, including all members of the

Plaintiff Settlement Class, as defined in the Settlement Agreement ("Settlement Agreement").

2. The definitions and provisions of the Settlement Agreement and the Notice of Pendency of Class Action and Proposed Settlement are hereby incorporated as though fully set forth herein.

3. This Court hereby approves the Settlement and finds that the Settlement is, in all respects, fair, reasonable, and adequate to the Plaintiff Settlement Class, and within the authority of the parties and resulted from extensive arm's-length negotiations.

4. Pursuant to CR 23(c), this Court hereby certifies, for settlement purposes only, a Class that consists of:

> All United States residents who (a) traveled on a Holland America Line cruise, (b) paid "port charges and taxes" on that cruise, and (c) departed on their cruise during the period from April 19, 1992 to April 30, 1996. Excluded from the class are Holland America employees and counsel, their immediate family members, and any reduced fare passengers who traveled under discounted fares that were not offered to the general public, such as participants in the Employee-Relative Program, travel agents, journalists, and so on.

In so holding, the Court makes the following findings:

(a) The Class is so numerous that joinder of all members is impracticable;

(b) There are certain questions of law or fact common to the above-described Class;

(c) For purposes of settlement, the claims of plaintiffs are typical of the claims of the above described Class;

(d) The plaintiffs, Francine Pickett, Brian Cohen, Jack Masin and Belle Masin, will fairly and adequately protect the interests of the above-described Class in connection with the Settlement;

(e) This Court on September 22, 1997 found that class certification for trial purposes was inappropriate with respect to causation and damages. However, in the context of deciding whether the Settlement is fair, adequate and reasonable, common questions of law and fact exist and predominate over questions affecting only individual Class members. Therefore, the Class is sufficiently cohesive to warrant adjudication through settlement by representation; and

(f) For purposes of Settlement, certification of the above-described Plaintiff Settlement Class is superior to other available methods for the fair and efficient settlement of the claims of the Class.

The plaintiffs are designated as Class representatives.

* * *

DONE IN OPEN COURT this 2 day of October, 1998.

/s/ Jay V. White
Honorable Jay V. White
Superior Court Judge

HEARING ON CLASS SETTLEMENT AGREEMENT EXCERPTS

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR KING COUNTY

FRANCINE PICKETT, BRIAN COHEN, JACK MASIN AND BELLE MASIN, individually and on behalf of all others similarly situated. Plaintiffs/respondents, LEONARD BEBCHICK, JOSEPH HESS, LEONA HESS, TOM CRAGO and LINDA CRAGO, Intervenors/appellants, Vs. HOLLAND AMERICA LINE – WESTOURS, INC., Defendant/respondent.	No. 96-2-10831-6 KNT COA No. 43582-5-I

Heard Before the Honorable Jay V. White, Judge

Appearances:

For the Plaintiffs:	George W. Sampson Dan Drachler Robert Schachter Attorneys at law
For the Defendant:	Stephen M. Rummage Attorneys at Law
for Intervenors:	Leonard Bebchick, pro se James Whitehead Dan Grausz Attorneys at Law

September 28, 1998
reported by Gary Crawford, Official Court Reporter

* * *

[86] THE COURT: Now, I think I understand the thrust of the point that fairness is independent of the certification decision, but I guess I am asking is that true? Is the Court not able to give any consideration at all to the legal posture of this case? You know, put bluntly, if the plaintiffs are in a sort of helpless position because of the Court's ruling can't the Court take that into account in recognizing that the individual claims may we will [sic] have merit?

* * *

[106] I am not going to prolong this much more except to say that I have considered this very carefully, and I think certainly, although it may be not the paramount concern of the Court, but I [107] can't help to go to it initially where I was most deeply involved, certainly the legal posture that this case is in I think is instructive on what is or is not a fair and a reasonable and adequate settlement, and you know once the Court denied certification it makes it very difficult to litigate whatever individual interests that each of the individuals may have.

I know that Holland America likewise has strongly advocated that even on the merits they would ultimately prevail, but certainly to do so they would likewise have to go through quite a bit of additional legal proceedings to achieve that result, and who knows just how many years of appeals may be involved. But there is no question that in terms of deciding what sort of a settlement

you can achieve in the current posture of the case, which strangely is unlikely to be improved, I think the Court can take that into account; and I am confident, or I shouldn't be sitting here, with the correctness of my decision.

I may, but on the other hand I certainly respect the possibility another trier of fact just might have reached a different opinion, and this case was assigned to me having been assigned to [108] another judge, and we will never know if there had been a different outcome if the case had not been resigned. I also don't let myself get too flattered by a judgment of the Court Commissioner because the standard there really has nothing to do with whether or not the Court agrees with me.

It's just an indication they can't find some obvious error on my part, and so that's not a very hi [sic] standard for the Court to meet, but the practical effect is the same in terms of enforcing the Court's decision if the parties want to continue the litigation. So I think that from the standpoint of where the case is that it is a remarkable settlement, and I have to commend counsel for the effort that they made to do this.

* * *

145 Wn.2d 178

THE SUPREME COURT OF WASHINGTON

FRANCINE PICKETT, BRIAN COHEN, JACK MASIN, BELLE MASIN, individually and on Behalf of all other similarly situated, Respondents,	NO. 70300-1
LEONARD BEBCHICK, Respondent,	**ORDER DENYING MOTION FOR RECONSIDERATION**
JOSEPH HESS, LEONA HESS, TOM CRAGO and LINDA CRAGO, Intervenors,	King County No. 96-2-10831-6 SEA
v.	C/A No. 43582-5-I (consol. w/ 43648-1-I)
HOLLAND AMERICA LINE – WESTOURS, INC., Petitioner.	

The Court having considered the Petition for Reconsideration of Leonard Bebchick;

Now, therefore, it is hereby

ORDERED:

That the Petition for Reconsideration of Leonard Bebchick is denied.

DATED at Olympia, Washington this 20th day of February 2002.

/s/ Gerry L. Alexander
CHIEF JUSTICE

PERTINENT PROVISIONS OF WASHINGTON CONSTITUTION AND RULES OF APPELLATE PROCEDURE

WASHINGTON CONSTITUTION

Art. 4, § 30. Court of Appeals

(1) Authorization. In addition to the courts authorized in section 1 of this article, judicial power is vested in a court of appeals, which shall be established by statute.

(2) Jurisdiction. The jurisdiction of the court of appeals shall be as provided by statute or by rules authorized by statute.

(3) Review of superior court. Superior court actions may be reviewed by the court of appeals or by the supreme court as provided by statute or by rule authorized by statute.

* * *

WASHINGTON RULES OF APPELLATE PROCEDURE

RULE 2.1 METHODS FOR SEEKING REVIEW OF TRIAL COURT DECISION – GENERALLY

(a) Two Methods for Seeking Review of Superior Court Decisions. The only methods for seeking review of decisions of the superior court by the Court of Appeals and by the Supreme Court are the two methods provided by these rules. The two methods are:

(1) Review as a matter of right, called "appeal"; and

(2) Review by permission of the reviewing court, called "discretionary review."

Both "appeal" and "discretionary review" are called "review." The term "decision" refers to rulings, orders, and judgments of the trial court, or the appellate court, as the context indicates.

* * *

RULE 2.2 DECISIONS OF THE SUPERIOR COURT WHICH MAY BE APPEALED

(a) Generally. Unless otherwise prohibited by statute or court rule and except as provided in sections (b) and (c), a party may appeal from only the following superior court decisions:

(1) *Final Judgment.* The final judgment entered in any action or proceeding.

(2) [Reserved]

(3) *Decision Determining Action.* any written decision affecting a substantial right in a civil case which in effect determines the action and prevents a final judgment or discontinues the action.

* * *

RULE 2.3 DECISIONS OF THE TRIAL COURT WHICH MAY BE REVIEWED BY DISCRETIONARY REVIEW

* * *

(c) Effect of Denial of Discretionary Review. Except with regard to a decision of a superior court entered in a proceeding to review a decision of a court of limited jurisdiction, the denial of discretionary review of a superior court decision does not affect the right of a

party to obtain later review of the trial court decision or the issues pertaining to that decision.

* * *

RULE 2.4 SCOPE OF REVIEW OF A TRIAL COURT DECISION

(a) Generally. The appellate court will, at the instance of appellant, review the decision or parts of the decision designated in the notice of appeal or notice for discretionary review and other decisions in the case as provided in sections (b), (c), (d), and (e).

* * *

RULE 4.1 REVIEW OF TRIAL COURT DECISION BY THE COURT OF APEPALS

(a) Decisions Reviewed by Court of Appeals. A party may seek review in the Court of Appeals of any trial court decision which is subject to review as provided in Title 2.

* * *

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 70300-1

(Court of Appeals Nos. 43582-5-I & 43648-1-I)

FRANCINE PICKETT, BRIAN COHEN,
JACK MASIN and BELLE MASIN,

Respondents,

LEONARD BEBCHICK,

Respondent,

v.

HOLLAND AMERICA LINE-WESTOURS INC

Petitioner.

PETITION FOR RECONSIDERATION OF RESPONDENT BEBCHICK

Leonard N. Bebchick
1101 Connecticut Avenue, NW
Washington, DC 20036
202/822-6401
Respondent pro se

Pursuant to RAP 12.4, respondent Bebchick petitions the court to reconsider its decision entered on November 29, 2001.

The court's decision denies Bebchick and other similarly situated putative class members of the fundamental due process protections guaranteed them by the 14th Amendment of the U.S. Constitution. That deprivation

flows from the court's action in effectively denying the putative class members a merits review of either of their respective challenges to the approval of the Settlement and the denial of class certification for trial[1]; these were appellate challenges for which Mr. Bebchick was expressly granted intervention to pursue. CP 1843. In itself treating, rather than remanding to the Court of Appeals, the Settlement's approval, this court singularly failed to address the merits of these issues fully briefed by respondent Bebchick. Moreover, the court reached conclusions which ignore and are contrary to the facts of record. We ask the court to reconsider and thereupon to vacate its approval of the Settlement as being fair, adequate and reasonable, and to remand for further consideration by the trial court.

* * *

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[1] The failure to consider, in any context, the merits of their challenge to the denial of class certification for trial – an effective denial of an appeal right conferred by law – also constitutes an infringement of the right of class members to the equal protection of the laws guaranteed by the 14th Amendment.

App. 75

No. 43582-5-I

(King County No. 96-2-10831-6-KNT)

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 1

FRANCINE PICKETT, BRIAN COHEN,
JACK MASIN and BELLE MASIN,
individually and on behalf of all
others similarly situated.
Plaintiffs/Respondents

LEONARD BEBCHICK,
Intervenor/Appellant

JOSEPH HESS, LEONA HESS,
TOM CRAGO and LINDA CRAGO,
Intervenors,

v.

HOLLAND AMERICA LINE – WESTOURS INC.
Defendant/Respondent.

REPLY BRIEF OF APPELLANT BEBCHICK

Leonard N. Bebchick
888 Sixteenth Street, NW
Washington, DC 20006
202/835-1921
Appellant pro se

June 14, 1999

* * *

2. While the denial of class certification is a key predicate for the asserted reasonableness of the settlement, and *not vice versa*, there is a further reason why the class certification issue must first be addressed and decided before this court considers the settlement issues. Contrary to the assertions of both respondents (Brief for Holland, p.9 n.6; Brief for Plaintiffs/Respondents, p.4 n.3), no proper basis here exists for the court's certification of the class for purposes of settlement.

The Supreme Court has made it abundantly clear that a class may be certified for settlement only if there exists a preponderance of common issues. *Amchem Products v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231 (1997). Here, if one credits the court's findings of its denial of certification for trial, there exist virtually no common issues, let alone the preponderance required, to support certification for settlement. We are speaking not of issues of trial manageability, but of substantive "claim for relief" merits issues whose disposition is requisite for plaintiffs securing a recovery award.

Respondent Holland argued, and the court found, that all of the key issues requisite for recovery – a cognizable right of action under state consumer protection laws, causation/reliance, damages and choice of law – each require individual adjudications for each plaintiff rather than common adjudication.[1] Holland further argues that the bar of limitations is an individual issue.

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[1] Such a constellation of issues, under the authorities Holland cites and we gather at n.7 *infra*, serves to deprive a class action of the requisite preponderance of common issues of law or fact.

It should be obvious that the court's *pro forma* finding of a preponderance of common issues[2] has no basis in the record and is directly contradicted by its findings denying class certification for trial due to the preponderance of individualized merits issues. In this case, the two determinations cannot be reconciled. Only one can hold true.

If the court's findings denying certification for trial are credited and upheld, then no colorable basis – no preponderance of common issues – exists for certifying the class for settlement. In that event, approval of the settlement agreement must be set aside as being beyond the lawful jurisdiction of the court. For this additional reason, the court's denial of class certification for trial must here be considered and decided before our challenge to the settlement can be entertained.

Respectfully submitted,

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Appellant *Pro Se*

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[2] Final Judgment ¶4(e), CP 289, states " . . . in the context of deciding whether the Settlement is fair, adequate and reasonable, common questions of law and fact exist and predominate over questions affecting only individual Class members." That catechism is correctly phrased, but its recitation is wholly devoid of substance. What, pray tell, are those purported *common* issues of law and fact which *predominate* over the host of issues found by the court to affect individual class members and to require individual adjudication?

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 70300-I

(Court of Appeals Nos. 43582-5-I & 43648-1-I)

FRANCINE PICKETT, BRIAN COHEN,
JACK MASIN and BELLE MASIN,

Respondents/Plaintiffs,

LEONARD BEBCHICK,

Respondent/Intervenor,

v.

HOLLAND AMERICA LINE-WESTOURS INC

Petitioner/Defendant.

BEBCHICK'S STATEMENT OF ADDITIONAL AUTHORITIES

Pursuant to RAP 10.8, respondent/intervenor Bebchick hereby submits the following authorities for the Court's consideration:

United Airlines v. McDonald, 432 U.S. 385, 97 S.Ct. 2464 (1977).

Deposit Guaranty National Bank v. Roper, 445 U.S. 326, 336-40, 100 S.Ct. 1166, 1173-75 (1980).

Lane v. Bethlehem Steel Corporation, 93 F.R.D. 611, 614-15, 617-18 (D.Md. 1982), *affirmed*, 736 F.2d 992 (4th Cir. 1984).

In Re Prudential Insurance Co. American Sales Litigation, 962 F.Supp. 450, 508-09 (D.N.J. 1997), *affirmed*, 148 F.3d 283, 307-09 (3rd Cir. 1998), *cert. denied*, 119 S.Ct. 890 (1999).

Duhaime v. John Hancock Mutual Life Insurance Co., 177 F.R.D. 54, 62 (D.Mass. 1997).

These authorities are relevant to the issues raised by Holland and discussed at argument upon the court's questioning as to (a) the right of an intervening putative class member to challenge the denial of class certification following the entry of a settlement or judgment in favor of the named plaintiffs, and (b) the requirement that the propriety of a court's class certification adjudication be decided before, and separately from, the consideration and determination of the reasonableness of the settlement.

Respectfully submitted,

/s/ Leonard N. Bebchick

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Honorable Jay V. White

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

FRANCES PICKETT, BRIAN COHEN, JACK MASIN and BELLE MASIN, individually and on behalf of all others similarly situated,	No. 96-2-10831-6KNT
Plaintiffs,	NOTICE OF APPEAL
v.	
HOLLAND AMERICA LINE-WESTOURS, INC.,	
Defendant.	

Plaintiff/Intervenor Leonard N. Bebchick hereby notices his appeal to Division I of the Court of Appeals of Washington of the following Judgment and Order entered herein:

1. Final Judgment, entered October 5, 1998.

2. Order denying plaintiffs motion for class certification, entered September 22, 1997.

November 2, 1998

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